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# SIXTH REPORT OF THE SELECT COMMITTEE ON THE OMBUDSMAN

The purpose of this "Special Report" is to focus the Legislature's attention solely on outstanding matters wherein recommendations of either or both of the Ombudsman and this Committee have been ignored or refused. It is the Committee's intention that its recommendations in this report will be individually debated and voted upon by the Legislature. Only when that has been done, will the Ombudsman's function have been completed. Only when that has been done, will this Committee's order of reference have been fulfilled.

TABLED IN THE LEGISLATIVE ASSEMBLY BY  
THE CHAIRMAN OF THE COMMITTEE  
PATRICK D. LAWLOR, Q.C., M.P.P.

3rd Session 31st Legislature

28 Elizabeth II







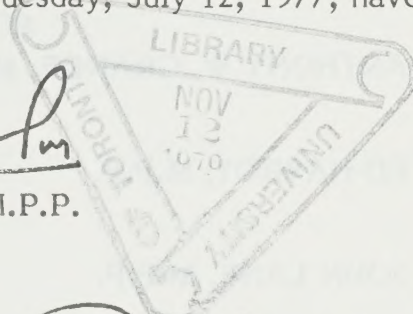
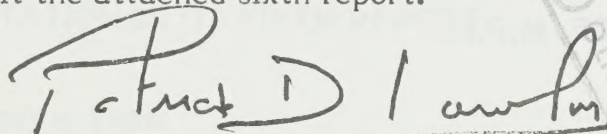
May 31, 1979

TO:

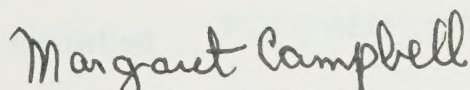
THE HONOURABLE JOHN E. STOKES  
Speaker of the Legislative Assembly  
of the Province of Ontario

Sir,

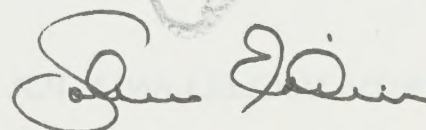
We, the undersigned members of the Committee appointed by the Legislative Assembly of the Province of Ontario on Tuesday, July 12, 1977, have the honour to submit the attached sixth report.



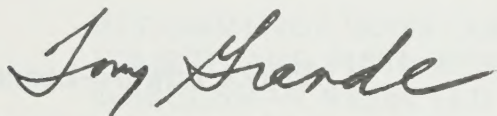
PATRICK D. LAWLOB, Q.C., M.P.P.  
Lakeshore  
Chairman



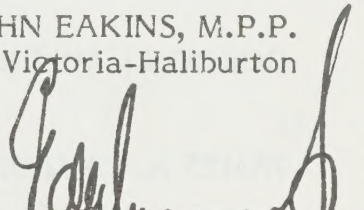
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St. George



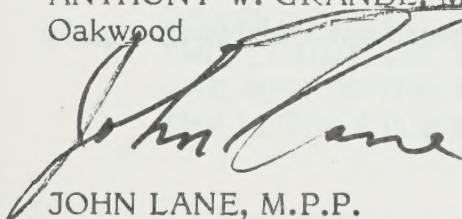
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Victoria-Haliburton



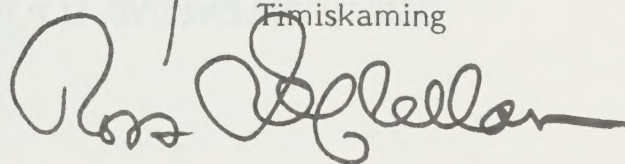
ANTHONY W. GRANDE, M.P.P.  
Oakwood



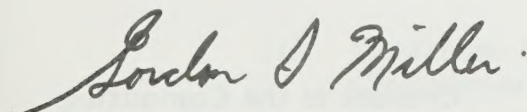
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Timiskaming



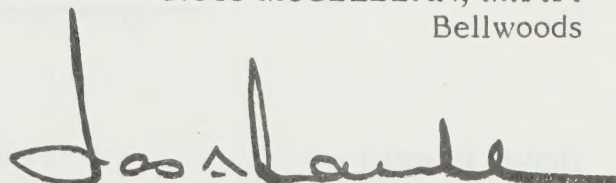
JOHN LANE, M.P.P.  
Algoma-Manitoulin



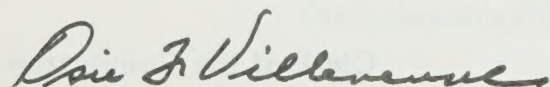
ROSS McCLELLAN, M.P.P.  
Bellwoods



GORDON I. MILLER, M.P.P.  
Haldimand-Norfolk



JAMES A. TAYLOR, Q.C., M.P.P.  
Prince Edward-Lennox



OSIE F. VILLENEUVE, M.P.P.  
Stormont-Dundas-Glengarry



MEMBERS OF THE SELECT COMMITTEE  
ON THE  
OMBUDSMAN

PATRICK D. LAWLOR, Q.C., M.P.P. Lakeshore

MARGARET CAMPBELL, Q.C., M.P.P. St. George

JOHN EAKINS, M.P.P. Victoria-Haliburton

ANTHONY W. GRANDE, M.P.P. Oakwood

ED HAVROT, M.P.P. Timiskaming

JOHN LANE, M.P.P. Algoma-Manitoulin

ROSS McCLELLAN, M.P.P. Bellwoods

GORDON I. MILLER, M.P.P. Haldimand-Norfolk

JAMES A. TAYLOR, Q.C., M.P.P. Prince Edward-Lennox

OSIE F. VILLENEUVE, M.P.P. Stormont-Dundas-Glengarry

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JOHN P. BELL Counsel to the Committee

ALEX McFEDRIES Clerk of the Committee



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## INTRODUCTION

The purpose of this "Special Report" is to focus the Legislature's attention solely on outstanding matters wherein recommendations of either or both of the Ombudsman and this Committee have been ignored or refused. It is the Committee's intention that its recommendations in this report will be individually debated and voted upon by the Legislature. Only when that has been done, will the Ombudsman's function have been completed. Only when that has been done, will this Committee's order of reference have been fulfilled.

On the 9th day of November, 1978, the Committee tabled its Fifth Report in the Legislative Assembly. The Report was placed on the order of paper for debate on November 27, 1978. During the period scheduled for debate, no Ministers of the Crown representing ministries or governmental organizations to whom the Committee had addressed recommendations in its Fifth Report were present in the Legislature or represented by any other member for the purpose of speaking to the Report generally and responding to any recommendations specifically.

The debate consisted substantially of comments by members of the Select Committee. The members of the Committee consider the scheduled debate to have been a total waste of time. Scheduled time for legislative debate is precious and short. It should not be taken up with a dialogue of Committee members. It should include meaningful comment and responses by representatives of the Government to whom Committee recommendations are addressed.

Specifically, the Committee's Fifth Report contained recommendations to governmental organizations (Workmen's Compensation Board and



Ministry of Health) wherein recommendations of the Ombudsman in his Third and Fourth Reports were supported by the Committee and presented in the form of Committee recommendations to the Legislature for implementation. These recommendations were totally ignored during the scheduled debate.

This experience has raised for discussion the role and effectiveness of this Select Committee. It has also raised for discussion the role and effectiveness of the Ombudsman when he seeks to have a recommendation made by him and refused by a governmental organization, supported by the Legislature and ultimately implemented thereby. It also raises for discussion the issue of the forum of reporting to be adopted by this Committee hereafter.

The Committee has historically functioned as more than an information source to the Legislative Assembly respecting the organization and operation of the "Ombudsman concept" in Ontario. It has served as a liaison and catalyst in the establishment, maintenance and improvement of the relationships between the Ombudsman and the many governmental organizations within his jurisdiction. It has also served as a means of implementing matters outstanding between the office of the Ombudsman and governmental organizations. It has been acknowledged by most who have come into contact with it as an effective instrument in the overall concept of an Ombudsman in the Province of Ontario. To ignore the Committee's efforts and Reports only serves to demean the concept of the Ombudsman in Ontario, the role and function of Select Committees of the Legislature, and the legislative process generally.

Unless our Ombudsman has access, directly or indirectly, to the Legislative Assembly, to seek support for any of his recommendations, he will not be fully effective in his office. Where it is appropriate and where the

circumstances so warrant, unless the Legislative Assembly is prepared to give full support to the Ombudsman's recommendations, then it is paying mere lip service to the concept of the Ombudsman in Ontario. Without such support of the Legislature, the Ombudsman is reduced to a reporter and record-keeper of complaints.

To paraphrase a legal maxim, to be fully effective, the Ombudsman must be seen to perform his functions. What better place than the forum of the Legislative Assembly to demonstrate to the people of the Province of Ontario that the Ombudsman operates and is effective at every level of his function.

The Committee has decided that it will best fulfil its responsibilities pursuant to its order of reference if it reports on Ombudsman recommendations and on Committee recommendations which have either been refused and ignored by either or both of the Legislature and the governmental organization to whom they have been addressed, in separate reports. Accordingly, this Sixth Report is confined to matters under the following categories:

- I     Recommendations of the Ombudsman in his Third and Fourth Reports which recommendations were refused by the governmental organization and which, after consideration by this Committee, were supported and recommended for implementation in its Fifth Report;
- II    Recommendations contained in the Fourth and Fifth Reports of the Ombudsman rejected by governmental organizations not previously considered by this Committee, and which after due consideration and deliberation by this Committee in its latest hearings, are supported and recommended to the Legislature for implementation.



## PART I

# RECOMMENDATIONS OF THE OMBUDSMAN IN HIS THIRD AND FOURTH REPORTS WHICH RECOMMENDATIONS WERE REFUSED BY THE GOVERNMENTAL ORGANIZATION AND WHICH, AFTER CONSIDERATION BY THIS COMMITTEE, WERE SUPPORTED AND RECOMMENDED FOR IMPLEMENTATION IN ITS FIFTH REPORT

## INTRODUCTION

In his Fourth Report, the Ombudsman included nine complaint summaries wherein recommendations made by him to the governmental organizations in question pursuant to Section 22(3) of The Ombudsman Act were not implemented by the governmental organizations. No actions or steps were taken by the governmental organizations which were considered adequate or appropriate by the Ombudsman. Accordingly, the Ombudsman referred the complaints pursuant to Section 22(4) to the Premier and thereafter to the Legislature through the vehicle of his Fourth Report.

The particular complaints were considered in detail by the Select Committee during its hearings in August, 1978. The Committee reported on each of the complaints in its Fifth Report (pages 55-81 inclusive).

In three cases, the Select Committee specifically accepted the recommendation of the Ombudsman made pursuant to Section 22(3) of The Ombudsman Act and recommended to the Legislature and the governmental organization concerned that the Ombudsman's recommendation be implemented. The following is a schedule identifying the Ombudsman's complaint summaries which contain his recommendations and the recommendations of this Committee to both the Legislature and the governmental organizations affected:

1. Ministry of Health, Complaint Summary No. 45, page 192 of the Ombudsman's Fourth Report.

Reported at pages 56-60 in the Committee's Fifth Report.

Recommendation No. 27 of the Committee's Fifth Report:

"With respect to Complaint #45 in the Ombudsman's Fourth Report, the Minister of Health implement as soon as reasonably practical, the recommendations of the Ombudsman as set out in his report dated December 16, 1977."

The Ombudsman's recommendations to the Ministry called for a consideration of a change to Section 47 of the Public Hospitals Act to provide a representation on the Hospital Appeal Board which more reflects the public interest and for an inquiry into the Public Hospitals Act to determine whether the provisions relating to the Hospital Appeal Board may be improperly discriminatory.

2. Workmen's Compensation Board, Ombudsman's Complaint Summary No. 76, pages 240-245 of his Fourth Report.

Reported by Select Committee at pages 63-66 of its Fifth Report.

Recommendation No. 29 of the Committee's Fifth Report:

"The Workmen's Compensation Board implement the Ombudsman's recommendations made in Complaint #76 of his Fourth Report by granting the complainant entitlement to the sum necessary to purchase the commercial type heating lamp which has been previously requested."

3. Workmen's Compensation Board, Ombudsman's Complaint Summary No. 79, pages 251-254 of his Fourth Report.

Reported by the Committee at pages 72-75 of its Fifth Report.

Recommendation No. 37 of the Committee's Fifth Report:

"The Workmen's Compensation Board implement the recommendation of the Ombudsman as set out in his report made pursuant to Section 22 of The Ombudsman Act respecting Complaint #79 in his Fourth Report."

The Ombudsman's recommendation called for The Workmen's Compensation Board to vary its order dated August 8, 1975, which disallowed a claim for total disability payments in relation to certain back disabilities said by the complainant to



have been sustained during the course of employment and to grant the complainant temporary total disability benefits from September 4, 1974 until such time as it is established that the complainant was medically fit to resume employment.

As of the tabling of the Ombudsman's Fifth Report with the Speaker of the Legislative Assembly, and as of the date wherein the Committee commenced its most recent hearings (January 23, 1979), the Ministry of Health and The Workmen's Compensation Board had not responded in any way to the Committee in respect of these recommendations.

#### MINISTRY OF HEALTH

The details of the Committee's consideration of this matter are set out in the following excerpt from its Fifth Report:

" MINISTRY OF HEALTH

(1) Complaint Summary #45 (page 192)

This was a complaint essentially of bias in respect of the Hospital Appeal Board established pursuant to Section 47 of The Public Hospitals Act. The complainant is a duly licenced member of the medical profession in Ontario whose appeal from a decision of the board of the Public Hospital refusing his application, was dismissed by the Hospital Appeal Board. The Ombudsman perceived the central issue raised by this complaint and by his subsequent investigation, to be access by a physician and that physician's patients to the public

hospital in Ontario that either the physician and/or the patients choose. The facts surrounding the complaint, the Ombudsman's investigation and the results thereof, are set out in the text of the Ombudsman's Fourth Report (pages 172-179).

After the Ombudsman had concluded his investigation, he formed the opinion that the statutory composition of the Hospital Appeal Board and the particular quorum which presided at the complainant's appeal, appeared to be improperly discriminatory within the meaning of Section 22(1) of The Ombudsman Act notwithstanding that the actions of the Board of the Public Hospital and the Hospital Appeal Board were in conformity with the relevant provisions of The Public Hospitals Act. The Ombudsman found that the present legislation does not prevent the membership of the Hospital Appeal Board from consisting of persons who are either past or present members of a public hospital board. The Ombudsman noted that the Board as presently constituted has only one member who is not either a past or a present member of a board of a public hospital. Further, the Ombudsman noted that the statutory quorum permitted under the present legislation has no stipulation of membership within the total Board panel. The quorum of the Board which heard the complainant's appeal in fact consisted of members all of whom were either past or



present members of hospital boards. Accordingly, the Ombudsman recommended to the Ministry of Health that:

- (a) the Ministry consider what changes should be made to The Public Hospitals Act (Section 47) to give a better effect to the principle of a widely distributed membership of the Board, even if reduced to a quorum. In making the recommendation, the Ombudsman noted that a statutory limitation period should be considered on the appointment of members who are either past or present members of hospital boards;
- (b) the Ministry inquire into the provisions of The Public Hospitals Act with a view to preventing acts flowing from Sections 44 to 50 thereof, which may be improperly discriminatory. The Ombudsman further suggested with respect to this recommendation that the Ministry consider assigning the task of such an inquiry to an organization such as The Ontario Council of Health.

In reply to the Ombudsman's recommendation, the Deputy Minister stated that in his opinion, the substance of the Ombudsman's recommendations were outside of his jurisdiction and accordingly, would only be

accepted as informal observations and suggestions. The Deputy Minister interpreted the Ombudsman's first recommendation as affecting the Hospital Appeal Board which, in his opinion, does not come within the definition of a "governmental organization" as defined by The Ombudsman Act. He interpreted the Ombudsman's second recommendation as applying to private hospital boards which everyone acknowledges to be outside the Ombudsman's jurisdiction."

" The Assistant Deputy Minister of Health and a member of the Ministry's legal staff appeared before the Committee to further explain the Ministry's position. The Committee noted that the Ministry has not considered nor commented upon the substance of the Ombudsman's recommendation due largely to its position respecting jurisdiction.

The Committee is of the opinion that the Ombudsman did have jurisdiction to investigate this complaint and to make the recommendations in question to the Ministry, to the extent that those recommendations and required action of the Ministry apply to the Public Hospital Appeal Board and the relevant statutory provisions of The Public Hospitals Act. The Committee views the thrust of the Ombudsman's recommendations to apply to the manner in which the Hospital Appeal Board fulfills



and appears to fulfill statutory functions. The Committee believes that any amendment to the relevant legislation which can remove any appearance of improperly discriminatory action as perceived by the Ombudsman, is to be encouraged.

Accordingly, the Committee recommends that with respect to Complaint No. 45 in the Ombudsman's Fourth Report, the Minister of Health implement as soon as reasonably practical, the recommendations of the Ombudsman as set out in his report dated December 16, 1977.(27)"

The Ministry advised the Committee of its position with respect to its Recommendation No. 27 by letter dated February 27, 1979. (See Schedule "I") The Committee discussed the Ministry's response with the Director of the Legal Branch of the Ministry of Health during its hearing held on the 28th of February, 1979.

The Committee concludes that the Ministry is not prepared to accept and implement the recommendation of the Ombudsman and thereby the recommendation of this Committee, for two reasons. First, that there are no prevailing or compelling circumstances which would warrant an inquiry or an examination of the staffing of public hospitals at this time. The Ministry referred to the findings of the "Grange Commission" which confirmed the concept of a "closed hospital" system and stated that no circumstances have arisen in the intervening period which would warrant a change in that concept.

Secondly, that legislative amendments necessary to assure that the Hospital Appeal Board be representative of all public interests at all of its proceedings was neither warranted or possible at the present time. The Ministry did state, however, that certain administrative adjustments might be made by the Board as presently constituted to ensure that hereafter the Board in its proceedings be as representative of all public interests as is possible with its present complement of members.

The Ministry has since advised the Committee that on all future hearings with respect to a hospital appointment, the full board will sit except where:

1. The parties to the hearing assent to some other composition; or
2. One of the members must disqualify himself by reason of conflict of interest or something analogous thereto, such as past association with the applicant.

Subsequent to receiving the Ministry's response, the Committee unanimously accepted the request of the complainant referred to in Complaint Summary No. 45 in the Ombudsman's Fourth Report, to appear before it.

On the 20th of March, 1979, the complainant, who identified himself as Dr. Claude MacDonald, appeared before the Committee in person and addressed submissions respecting the recommendations made by the Ombudsman and this Committee and the Ministry's response thereto. Dr. MacDonald raised certain issues respecting the questions of staffing procedures at public hospitals and the constitution of the Hospital Appeal Board which were not previously referred to by the Ombudsman or the Ministry of Health.



For example, Dr. MacDonald referred the Committee to comments of the Honourable Mr. Justice Grange, Chairman of the Grange Commission, which appeared to take issue with the present constitution of the Hospital Appeal Board as being truly representative of all public interests. Quoting from certain edited proceedings of the Continuing Education Program of the Law Society of Upper Canada dated January, 1977, His Lordship stated at page 51 of the Proceedings:

"There are two features of the legislation that I must mention because I want to deny paternity. We looked upon the problem as essentially a factual one and recommended that the Hospital Appeal Board contain one legal person, one lay person and three doctors, because we believed the major conflicts would be medical and that doctors would be the best people to resolve those types of conflicts. Some people were critical of that proposal, saying doctors would all act and think together. In our experience nothing was further from the truth. Their opinions were often violent but seldom identical. Our only reservation about doctors on the Hospital Appeal Board was contained in these words:

'We may say, however, that we do not believe these doctors should be representatives of any particular school of thought within the profession, or be accountable to anyone but their own consciences for their decisions. No doctor can, of course, be without views on the issues that

have been presented to this committee but our firm belief is that each case must be resolved upon its own facts and circumstances, and the resolution is not assisted when the judges come to the hearing with the fixed, polarized positions of the organizations they represent.'

Certainly we did not intend to establish any further appeal, if only because of the enormous cost to the doctor of the litigation, even though doctors earn more than anybody, even mailmen. For the hospitals we were not so concerned because they are now essentially funded from the public purse.

I was not consulted on the legislation and there is no reason why I should have been, particularly as my class-mate was no longer Minister of Health when it was drafted. Anyway, our views as to the composition of the board were not carried into the amendment to The Public Hospitals Act. The legislation reduced the number of doctors from three to two and increased the lay members from one to two, adding that one of the latter should be a member of a hospital board. It is perhaps not of earth-shaking importance but I can only conclude that the new minister and his advisors either did not like our recommendations or missed the point entirely."



and at page 59:

The last thing in the world we wanted was to have people who are representative of some school of thought, that is the Hospital board.

In fact it happened that almost all of the members turned out to be either members or former members of the Boards of Trustees of hospitals. I think it was a mistake. I may be wrong, I do not suggest for a moment that they have been unfair, but ... it does not look right and should not have been done. I think it may have been done to appease the hospitals who were the people who are least likely to be satisfied with the report because some of their power was being taken away from them."

The Committee has attached the full text of the Law Society's proceedings concerning Hospital Privileges as Schedule "2".

Dr. MacDonald also referred to colleagues in the medical profession who have experienced the same difficulty in obtaining hospital appointments of their choice but who have been less vocal and energetic in their efforts.

The Committee does not wish to make a finding as to which interpretation, that of Dr. MacDonald or the Ministry, respecting the staffing procedures of public hospitals and membership of the Hospital Appeal Board is the more accurate. That is not its function. To the extent that such a finding is necessary, it could only be made by a body of inquiry after all relevant issues have been thoroughly aired and considered.

The Committee is of the opinion that an examination of the issues of the staffing procedures at public hospitals and the composition of the Hospital Appeal Board is necessary. The Committee was not satisfied with the response made by the Ministry of Health to the recommendations of the Ombudsman and to its recommendation in its Fifth Report. In the Committee's opinion, something more is required to fully satisfy the concerns raised by Dr. MacDonald, and the recommendations made by the Ombudsman.

The Committee remains convinced that the recommendations of the Ombudsman made to the Ministry of Health in his report pursuant to Section 22(3) should be implemented by the Ministry of Health directly or pursuant to an act of the Legislature. ACCORDINGLY, THE COMMITTEE RECOMMENDS THAT THE MINISTRY OF HEALTH CONSIDER WHAT CHANGES SHOULD BE MADE TO THE PUBLIC HOSPITALS ACT AND SECTION 47 IN PARTICULAR, INCLUDING CHANGES IN THE QUORUM PROVISIONS AND LENGTH OF MEMBERSHIP RESPECTING THE HOSPITAL APPEAL BOARD, TO GIVE BETTER EFFECT TO THE PRINCIPLE OF A WIDELY DISTRIBUTED MEMBERSHIP OF THE HOSPITAL APPEAL BOARD. FURTHER, THE MINISTRY OF HEALTH CAUSE AN INQUIRY TO BE MADE INTO THE PROVISIONS OF THE PUBLIC HOSPITALS ACT TO IDENTIFY AND TO CORRECT ANY ACTS FLOWING FROM SECTIONS 44 TO 50 OF THE ACT WHICH MAY BE IMPROPERLY DISCRIMINATORY.<sup>(1)</sup>

#### WORKMEN'S COMPENSATION BOARD

When the representatives of The Workmen's Compensation Board appeared before the Committee in January, 1979, they advised that certain



questions were raised by the corporate board respecting the Board's authority to reject recommendations made by the Committee in its Fifth Report.

The general counsel of The Workmen's Compensation Board with the approval of the corporate board and the Minister of Labour forwarded a letter to the Honourable R. Roy McMurtry, Q.C., Attorney General, dated February 19, 1979 seeking his opinion on four areas. (See Schedule 3) The Committee was advised by the Board that they would not make any decision respecting implementation or whatever of Recommendations 29 and 37 of the Committee's Fifth Report until the Attorney General's opinion was received.

On March 30, 1979, the Committee, through its counsel, received a copy of the Attorney General's opinion given to The Workmen's Compensation Board dated March 15, 1979. (See Schedule 4)

The Committee understands the Attorney General's opinion to be that The Workmen's Compensation Board is not compelled to implement any recommendation made to it by the Select Committee in its Fifth Report. The Committee agrees with the Attorney General that "the Committee's recommendations concerning decisions of The Workmen's Compensation Board are not binding on the Board". However, if a recommendation of the Select Committee is adopted by the Legislature pursuant to an appropriate motion, then that recommendation becomes an act of the Legislature. Failure of The Workmen's Compensation Board to carry out the will of the Legislature carries the possible consequences as set out in The Legislative Assembly Act.

The Committee has subsequently been informed that the corporate board discussed the opinion of the Attorney General on March 15, 1979, together

with Recommendations 29 and 37 of the Committee's Fifth Report. Recommendations 29 and 37 of the Committee's Fifth Report are as follows:

Recommendation No. 29

The Workmen's Compensation Board implement the Ombudsman's recommendations made in Complaint #76 of his Fourth Report by granting the complainant entitlement to the sum necessary to purchase the commercial type heating lamp which has been previously requested.

Recommendation No. 37

The Workmen's Compensation Board implement the recommendation of the Ombudsman as set out in his report made pursuant to Section 22 of The Ombudsman Act respecting Complaint #79 in his Fourth Report.

The Ombudsman's recommendation called for The Workmen's Compensation Board to vary its order dated August 8, 1975, which disallowed a claim for total disability payments in relation to certain back disabilities said by the complainant to have been sustained during the course of employment and to grant the complainant temporary total disability benefits from September 4, 1974 until such time as it is established that the complainant was medically fit to resume employment.

The Board has decided to accept Recommendation No. 29. However, with respect to Recommendation No. 37, the Board has decided not to accept or implement it. (See Schedule 5)

The Committee is concerned lest the opinion of the Attorney General be taken by The Workmen's Compensation Board and in fact by other governmental organizations as a statement that a recommendation of a Select Committee of the Legislature may be disregarded for any reason. That is not the thrust of the Attorney General's opinion. The Committee does not believe the Attorney General ever intended that his opinion should be applied in that way.

The Committee believes the root of The Workmen's Compensation Board's position to lay in the manner in which the Committee's Fifth Report was tabled and debated in the Legislature. It is true that the Report was tabled for consideration and not for adoption. There was no motion before the House to adopt the Report. Had that motion been before the House and had it been approved by a majority, then The Workmen's Compensation Board would be bound by law to implement the recommendations. They would thereby not be the recommendations of this Committee but of the Legislative Assembly of the Province of Ontario.

If The Workmen's Compensation Board and, in fact, other governmental organizations, intend to use the non-adoption of a Committee's report by the Legislature as a reason for refusing to implement any recommendations contained therein, then the Committee is left with no alternative but to hereafter table its reports in the Legislature in such a way as to require a vote for adoption.

Notwithstanding The Workmen's Compensation Board's actions with respect to Recommendation No. 27, the Committee remains convinced that the recommendations in its Fifth Report respecting the two outstanding complaints must be implemented. THE COMMITTEE THEREFORE RECOMMENDS THAT THE LEGISLATURE REQUIRE THE WORKMEN'S COMPENSATION BOARD TO IMPLEMENT THE RECOMMENDATIONS OF THE OMBUDSMAN MADE PURSUANT TO SECTION 22(3) OF THE OMBUDSMAN ACT MADE TO THE WORKMEN'S COMPENSATION BOARD IN COMPLAINT NO. 76 AS REPORTED IN HIS FOURTH REPORT TO THE LEGISLATURE BY GRANTING THE COMPLAINANT IN QUESTION ENTITLEMENT TO THE SUM NECESSARY TO



PURCHASE THE COMMERCIAL TYPE HEATING LAMP WHICH HAS PREVIOUSLY BEEN REQUESTED.<sup>(2)</sup>

THE COMMITTEE RECOMMENDS THAT THE LEGISLATURE REQUIRE THE WORKMEN'S COMPENSATION BOARD TO IMPLEMENT THE RECOMMENDATION OF THE OMBUDSMAN MADE TO THE WORKMEN'S COMPENSATION BOARD PURSUANT TO SECTION 22(3) OF THE OMBUDSMAN ACT IN COMPLAINT NO. 79 OF HIS FOURTH REPORT BY RECONSIDERING ITS APPEAL BOARD DECISION OF MARCH 4, 1976 AND GRANTING ENTITLEMENT TO THE COMPLAINANT ON THE BASIS OF AN AGGRAVATION OF A PRE-EXISTING BACK DISABILITY, TO TEMPORARY TOTAL DISABILITY BENEFITS FROM SEPTEMBER 4, 1974 UNTIL SUCH TIME AS IT IS ESTABLISHED THAT THE COMPLAINANT WAS MEDICALLY FIT TO RETURN TO EMPLOYMENT WITHIN THE COMPLAINANT'S CAPABILITIES.<sup>(3)</sup>

## PART II

RECOMMENDATIONS CONTAINED IN THE FOURTH AND FIFTH REPORTS OF THE OMBUDSMAN REJECTED BY GOVERNMENTAL ORGANIZATIONS AND WHICH AFTER DUE CONSIDERATION AND DELIBERATION BY THIS COMMITTEE IN ITS LATEST HEARINGS, ARE SUPPORTED AND RECOMMENDED TO THE LEGISLATURE FOR IMPLEMENTATION

The Fifth Report of the Ombudsman included seven cases wherein recommendations made pursuant to Section 22(3) were not implemented by the governmental organization concerned (one to the Ministry of Health, one to the Ministry of Revenue and five to The Workmen's Compensation Board).

The Committee is pleased to report that during its hearings, the Ministry of Health agreed to accept the Ombudsman's recommendation. With respect to the recommendation made to the Ministry of Revenue, the Ombudsman considered the Ministry's response "not untenable" and decided not to refer it to the Premier pursuant to Section 22(4) of The Ombudsman Act. The Committee will be dealing with these two complaints further in its Seventh Report.

For completeness, the Committee has included the remaining five cases in this Report, notwithstanding that the recommendation of the Ombudsman contained in one is not supported.

### WORKMEN'S COMPENSATION BOARD

#### (A) OMBUDSMAN'S FOURTH REPORT

##### (1) Complaint No. 82 Reported in the Ombudsman's Fourth Report (pages 261-264)

The Committee at page 80 of its Fifth Report addressed a recommendation (Recommendation No. 39) that "The Workmen's Compensation Board

advise the Committee forthwith of its further response to the Ombudsman's recommendation as soon as it is made to the Ombudsman and thereafter the Ombudsman advise the Committee whether, in his opinion, that further response is adequate and appropriate".

This complaint concerns a decision of the Appeal Board of The Workmen's Compensation Board dated January 8th, 1976 which awarded the complainant a partial disability of 50% from December 12, 1967 to January 15, 1968 and a temporary partial disability of 25% from January 15, 1968 to January 10, 1969, all in respect of a right knee disability resulting from an industrial accident on the 5th of April, 1967.

The circumstances of the complaint and the Ombudsman's investigation are fully set out in the text of his Fourth Report at pages 261-264.

After the Ombudsman's investigation was completed, he recommended to The Workmen's Compensation Board that the complainant receive 100% benefits from December 12, 1967 to May 22, 1968 and 50% benefits from May 23, 1968 to January 29, 1969. It is in respect of this recommendation and the Committee's recommendation quoted above that representatives of the Ombudsman's office and The Workmen's Compensation Board held discussions in February, 1979.

As a result of those discussions, the Board reconsidered its January 8th, 1976 decision. As a result, it rendered a further decision dated the 21st of February, 1979 which increased the benefits from 25% to 50% from the 15th of January, 1968 to the 10th of January, 1969.



The Committee was advised that the Ombudsman considers this further action by the Board not to be adequate and appropriate. The Committee therefore, in this case, considered whether it could support the Ombudsman's recommendation that the period of disability from January 15th, 1968 to May 22nd, 1968 ought to be increased from 50% to 100%.

The Committee understands the basis of the Ombudsman's recommendation for 100% disability benefits within the January to May, 1968 period to be that the complainant during that period was hospitalized for treatment for emotional difficulties which the Ombudsman considers to be directly attributable to the industrial accident and the recurring symptoms in consequence thereof. Representatives of The Workmen's Compensation Board advised the Committee that notwithstanding the acknowledgment that some emotional symptoms were a result of and caused by the industrial accident and the symptoms occasioned thereby, the Board is not prepared to increase the disability allowance for the period of time the complainant required and received hospital treatment (March 2nd, 1968 to May 22nd, 1968). It seems that the Board has not differentiated the extent of the disability suffered by the complainant during the period he was hospitalized in 1968 from the remaining period. This appears to be so notwithstanding that the Board has assessed the degree of organic disability at a constant percentage for the total period of compensation.

The Committee is unable to totally accept and support the recommendation of the Ombudsman in respect of the remaining disability period in question (ending May 22nd, 1968). On the other hand, the Committee does not accept the reasons provided by the Board in refusing to increase the disability payments for the period in which the complainant was hospitalized for symptoms

which have been acknowledged to be related to the industrial accident (March 2nd, 1968 to May 22nd, 1968). The Committee does not consider it within its sphere of competence to suggest or fix a percentage of disability awarded in excess of the 50% already granted. Rather, this is best left to The Workmen's Compensation Board to assess, drawing from its resources of knowledge and experience.

ACCORDINGLY, THIS COMMITTEE RECOMMENDS THAT THE WORKMEN'S COMPENSATION BOARD INCREASE THE COMPLAINANT'S TEMPORARY PARTIAL DISABILITY BEYOND 50% FOR THE PERIOD MARCH 2ND, 1968 TO MAY 22ND, 1968 BY AN AMOUNT DETERMINED BY THE BOARD TO BE APPROPRIATE IN THE CIRCUMSTANCES.<sup>(4)</sup>

(B) OMBUDSMAN'S FIFTH REPORT

(2) Complaint No. 57 in the Ombudsman's Fifth Report (pages 214-217)

This complaint concerns a decision of an Appeal Board panel dated November, 1976 wherein the complainant's claim that permanent partial disability benefits be increased from 20%, was denied.

The circumstances of the complaint and the Ombudsman's investigation are fully summarized in the Ombudsman's Fifth Report.

After completing his investigation, the Ombudsman concluded that the Appeal Board was unreasonable in limiting the complainant's entitlement to benefits at 20%. He accordingly recommended that The Workmen's Compensation Board revoke its decision and award the complainant a permanent disability award which would more adequately reflect the medical opinions available as to the complainant's permanent disability as a result of the compensable accidents.

The Committee is of the opinion that the reason for the failure of the Ombudsman and The Workmen's Compensation Board to agree on this matter rests in a difference of interpretation in two previous assessments made of this complainant's disability by Board officials. One assessment made in 1973 awards a 20% benefit payment due to psychiatric disability. A second award made in 1974 appears to base the award on continuing organic symptoms referable to the complainant's neck and shoulder.

The Ombudsman concluded that the two assessments should be read conjunctively, the result being a total award in excess of 20%. The Workmen's Compensation Board disagrees saying, in effect, that the latter assessment, although specifically referred to organic disability, must include the psychological factors.

Representatives of the Board appearing before the Committee conceded that it is unclear and confusing as to whether the 20% disability assessment applies to either or both of the organic and psychological symptoms displayed by this complainant.

The Committee is of the opinion that confusion does, in fact, exist as to the actual percentage of permanent partial disability benefits which this complainant is entitled to for the material periods of time. It is satisfied that notwithstanding the efforts of representatives of The Workmen's Compensation Board including the Appeal Board panel involved, a resolution of this confusion has not yet been achieved.

Accordingly, the Committee accepts and supports the recommendation of the Ombudsman as contained in his Report to The Workmen's



Compensation Board pursuant to Section 22(3) of The Ombudsman Act. THE COMMITTEE THEREFORE RECOMMENDS THAT THE WORKMEN'S COMPENSATION BOARD IMPLEMENT THE OMBUDSMAN'S RECOMMENDATION BY AWARDING THE COMPLAINANT A PERMANENT DISABILITY AWARD WHICH WOULD MORE ADEQUATELY REFLECT THE PREVAILING MEDICAL OPINIONS AS TO THE PERMANENT DISABILITY RESULTING FROM THE TWO COMPENSABLE ACCIDENTS. IN MAKING THIS RECOMMENDATION, THE COMMITTEE IS OF THE OPINION THAT THIS DISABILITY AWARD SHOULD BE SOMETHING IN EXCESS OF 20%.<sup>(5)</sup>

(3) Complaint No. 58 in the Ombudsman's Fifth Report (pages 218-222)

This complaint concerns a decision of an Appeal Board panel of The Workmen's Compensation Board dated September, 1975 which denied the complainant's claim for compensation respecting compensation on a total disability basis between June, 1973 and March, 1975 caused by a compensable injury which occurred to the complainant in August of 1948.

The circumstances of the complaint and the Ombudsman's investigation are fully set out in the Ombudsman's Report.

After the Ombudsman conducted his investigation, he formed the opinion that the Appeal Board's decision was unreasonable and that the Board should confer the benefit of doubt to award total disability benefits for the period in question. He accordingly recommended that the decision of the Appeal Board be cancelled and that the complainant be held entitled to benefits for the period in question.

The Workmen's Compensation Board, in response to the Ombudsman's recommendation, advised that the Appeal Board panel in question had requested the opinion of an independent orthopedic specialist with respect to the relationship of the complainant's left knee disability commencing in June, 1973 to the compensable accident in 1948. It was stated that the specialist will be directed to consider the opinions of orthopedic specialists retained by the Ombudsman's office and by the Board previously. The Ombudsman's office informed the Committee that this response was neither adequate nor appropriate and pressed the Committee to fully consider this complaint as soon as possible.

The Committee understands that the Board has experienced difficulty in obtaining this independent medical assessment, for reasons beyond its control. In the interim, the Board has requested a further medical opinion from the orthopedic specialist formerly retained by it.

The Committee is of the opinion that the recommendation of the Ombudsman should be supported. Having regard to the prevailing medical opinions to date and the expression of the Board that a need for a further medical opinion does exist, the Committee is of the view that the Board's policy of benefit of reasonable doubt is applicable. ACCORDINGLY, THE COMMITTEE RECOMMENDS THAT THE WORKMEN'S COMPENSATION BOARD IMPLEMENT THE OMBUDSMAN'S RECOMMENDATION BY AWARDING ENTITLEMENT TO THE COMPLAINANT FOR THE PERIOD OF DISABILITY COMMENCING JUNE, 1973 AND ENDING MARCH, 1975.<sup>(6)</sup> THE COMMITTEE FURTHER RECOMMENDS THAT THE WORKMEN'S COMPENSATION BOARD ASSESS AND DETERMINE THE NATURE AND EXTENT OF THE DISABILITY BENEFITS FOR THE PERIOD IN QUESTION WHICH IT CONSIDERS ADEQUATE AND APPROPRIATE IN THE CIRCUMSTANCES.<sup>(7)</sup>

(4) Complaint No. 59 in the Ombudsman's Fifth Report (pages 223-226)

This complaint concerns a decision of an Appeal Board panel of The Workmen's Compensation Board in December, 1973 denying the complainant's claim for widow's pension on the grounds that the death of her husband was not due to a factor compensable under The Workmen's Compensation Act, to wit, silicosis.

The circumstances of the complaint and the Ombudsman's investigation are fully set out in the text of his Fifth Report.

After the Ombudsman concluded his investigation, he formed the opinion that the decision of the Appeal Board panel was unreasonable. The Ombudsman further formed the opinion that the medical evidence available to the Board supports the proposition that on the balance of probabilities, the complainant's husband's death was related to complications arising from silicosis. Accordingly, the Ombudsman recommended, pursuant to Section 22(3) of The Ombudsman Act that the benefit of doubt be extended to the complainant and that the Appeal Board panel revoke its decision and order that a widow's pension be awarded. The Ombudsman further recommended that the Appeal Board panel consider whether the deceased might reasonably have been eligible for benefits in his lifetime.

The Workmen's Compensation Board declined to accept and implement the Ombudsman's recommendations on the grounds that the expert opinions sought by them in this case support the decision to reject the claim for benefits.



The Ombudsman, in the course of his investigation, obtained opinions of two medical consultants. Those consultants advised the Ombudsman, in substance, that the deceased had silicosis at the time of his death and although it was not the primary cause of death, it was a contributing factor. These medical opinions were rejected by the Board and the expert advisory committee retained by it for specific advice on this claim.

The Committee has had great difficulty considering and assessing the positions of the Ombudsman and The Workmen's Compensation Board in this case. It is due partly to the extremely complex medical issues that are raised by this complaint. It is due further to the difficulty in understanding and implementing the Board's doctrine of benefit of reasonable doubt as recommended by the Ombudsman. It is due further to the fact that this case has turned into a "war" of experts. On the one hand, the Ombudsman's office has retained two expert opinions that assert a causal connection between the death and the disease of silicosis. On the other hand, the Board has obtained two expert opinions to the contrary. The situation is made even more difficult when one realizes that none of the experts referenced in this case had ever examined the individual for the condition of silicosis while he was alive.

The Committee is unable to support the recommendation of the Ombudsman in this case. To do so would be, in the Committee's opinion, to permit conjecture and speculation on the part of the medical profession to dictate the judgments and decisions of The Workmen's Compensation Board. That is not to place the expert assistance provided to the Board on any higher level. The unfortunate fact of this case is that no one with any degree of training or expertise was able to assess the deceased's condition concurrent or reasonably concurrent with the event of death.

The Committee is not stating by its decision that silicosis is not, given other similar circumstances, a precipitating factor in death from which widow's benefits should flow. It is just stating that in this case it cannot point to any number of factors sufficient to require The Workmen's Compensation Board to apply the doctrine of reasonable doubt. The Committee is regrettably not able to say in this case that, against the background of expert opinions received by it, the Board's response has been neither adequate nor appropriate.

(5) Complaint No. 60 in the Ombudsman's Fifth Report (pages 226-230)

This complaint concerns a decision of an Appeal Board panel of The Workmen's Compensation Board in December, 1976 which denied the complainant's application for benefits for symptoms referable to the complainant's low back disability. The Appeal Board panel refused to accept that a relationship existed between the low back symptoms complained of and the compensable injury which occurred in January, 1972.

The circumstances of the complaint and the Ombudsman's investigation are fully set out in the text of the Ombudsman's Report.

After completing his investigation, the Ombudsman formed the opinion that the Appeal Board panel wrongly concluded that there was no evidence to support any relationship between a low back disability and the compensable accident. He accordingly recommended, pursuant to Section 22 of The Ombudsman Act, that the Appeal Board should revoke its decision of March 3, 1976 and order that the complainant be granted entitlement to a permanent disability award in recognition of a low back disability.

The Workmen's Compensation Board declined to accept and implement the Ombudsman's recommendation. The Board is of the view that the delay between the compensable accident, the symptoms referable to the low back and the return to work in the interval supports the conclusion that the low back disability was not occasioned by the accident.

The Workmen's Compensation Board however, in response to the Ombudsman's recommendation, has appointed a medical referee to examine the issue of the causal relationship between the compensable accident and the person's low back symptoms. The Committee understands that the referee has only just begun his investigation. It further understands that The Workmen's Compensation Board has requested that the referee expedite his report.

The Committee is of the opinion that there was, in fact, evidence available to the Appeal Board panel of The Workmen's Compensation Board upon which a finding of a causal relationship between the compensable accident and the low back disability could be made. The Committee considers it is supported in this opinion by the actions of The Workmen's Compensation Board in causing a medical referee to be appointed to inquire into and assist it on that issue.

The Committee supports the recommendation of the Ombudsman made to The Workmen's Compensation Board in this matter. THE COMMITTEE THEREFORE RECOMMENDS THAT THE WORKMEN'S COMPENSATION BOARD REVOKE ITS DECISION DATED MARCH 3, 1976 AND ORDER THAT THE COMPLAINANT IS ENTITLED TO A PERMANENT DISABILITY AWARD RESPECTING THE LOW BACK DISABILITY FOR THE PERIODS REFERENCED IN THE OMBUDSMAN'S REPORT.<sup>(8)</sup> In making this recommendation, the



Committee assumes that The Workmen's Compensation Board will be guided and assisted by the report of the medical referee in assessing the amount of benefits to be paid.

(6) Complaint No. 61 in the Ombudsman's Fifth Report (pages 230-235)

This complaint concerns a decision of an Appeal Board panel of The Workmen's Compensation Board dated June, 1977 that disallowed the complainant's claim for benefits which the complainant contends arose as a result of a fall at work during the summer of 1976. The complainant did not report the incident immediately to his employer. The symptoms apparently increased for a two-week period subsequent to the accident and eventually required hospitalization. The complainant did not submit an accident report to his employer for approximately six weeks after the accident.

The circumstances of the complaint and the Ombudsman's investigation are set out in the text of the Ombudsman's Fifth Report.

After the Ombudsman's investigation was completed, he formed the opinion that the Appeal Board's decision of June, 1977 unreasonably denied the complainant entitlement in this claim. In the Ombudsman's opinion, in light of prevailing medical reports, the policy of benefit of the doubt should be extended to the complainant and the Board should award him temporary total disability benefits for time lost at work as a result of the compensable injury.

The Workmen's Compensation Board declined to accept and implement the recommendation on the grounds that no relationship had been established between the symptoms complained of and the incident at work in July, 1976 as described by the complainant.

The Committee understands the basis of The Workmen's Compensation Board's position to be essentially that it did not accept the complainant's evidence that he sustained the compensable accident in July, 1976. The Board appears quite prepared to accept that the complainant has experienced symptoms referable to his neck and shoulder for the period of time in question. The issue therefore revolves solely on the question of credibility. The Committee accepts and supports the recommendation of the Ombudsman. In the Committee's opinion, there is ample evidence available to The Workmen's Compensation Board to apply the doctrine of benefit of the doubt in favour of the complainant to the one remaining issue - whether an accident occurred on the day in question. ACCORDINGLY, THE COMMITTEE RECOMMENDS THAT THE WORKMEN'S COMPENSATION BOARD IMPLEMENT THE RECOMMENDATION OF THE OMBUDSMAN BY AWARDING THE COMPLAINANT TEMPORARY TOTAL DISABILITY BENEFITS FOR THE TIME LOST AT WORK AS A RESULT OF THE INJURY WHICH OCCURRED AT WORK IN JULY, 1976.<sup>(9)</sup>



Ontario

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SCHEDULE "1"

*Tabled February 28/79  
Am. Fedres.  
Clerk*

Ministry  
of  
Health

Legal  
Branch  
416 / 965 - 2477

10th Floor,  
Hepburn Block,  
Queen's Park,  
Toronto, Ontario  
M7A 1S3

February 27, 1979

Messrs. Shibley, Righton & McCutcheon  
Barristers & Solicitors  
18th Floor  
401 Bay Street  
Toronto, Ontario

Attention: John P. G. Bell, Esq.

Dear Mr. Bell:

Re: Select Committee's Fifth  
Report - Recommendation  
No.27 (Hospital Appeal Board)

I have been asked to advise you of the  
Ministry's position with respect to the Committee's  
Recommendation.

COMPREHENSIVE REVIEW OF  
ALL LEGISLATION  
RESPECTING HOSPITAL  
APPOINTMENTS

This matter was canvassed fully in 1971/72 by  
the Committee of Inquiry into Hospital Privileges  
in Ontario (The "Grange Committee", after its  
Chairman, Samuel Grange, Q.C., now Mr. Justice Grange  
of the Supreme Court of Ontario). Amongst the  
points made by the Committee in its Report to the  
then-Minister of Health on January 14, 1972 were:

1. The Committee was not prepared to recommend  
"open hospitals";
2. Appointments to the medical staff should be  
within the discretion of the Board of  
Trustees of the hospital, on the recommenda-  
tion of its Medical Advisory Committee;
3. To ensure impartiality - including, pre-  
sumably, impartiality on the part of the  
Medical Advisory Committee - the Hospital  
Appeal Board should have full power to



review and decide the propriety or otherwise of a rejection.

The Public Hospitals Act was amended in 1972, to enact the essential provisions of the Grange Committee Report. Since that time, and notwithstanding the Ministry's extensive contact with such professional bodies as the Ontario Medical Association, the Ministry has not been made aware of any significant objection to the existing comprehensive system for hospital appointments - with the exception of the Ombudsman's Recommendations in this matter.

The Ombudsman's Recommendations stem from his perception that, in the case of the complainant,

1. the three general surgery positions open at the hospital had been filled by physicians who had worked under the Chief of Surgery at the hospital;
2. a representative of the hospital's Board of Governors stated that

"the hospital and the Board of Governors prefer a closely-knit group to work together to the exclusion of others"; and

3. the complainant's counsel said

"I am saying that equal consideration was not given to applicants who were not known or not friendly with or who had not served under members of the Medical Advisory Board of the hospital."

The Ombudsman concluded from this that application of the statute had led to a situation "which could be described as 'improperly discriminatory' under The Ombudsman Act, 1975." The Ombudsman therefore recommended the comprehensive inquiry.

It is pertinent to point out that, notwithstanding what the complainant's counsel said, the Hospital Appeal Board in fact found that

"no evidence was adduced by the Appellant upon which this Appeal Board could

conclude that (the complainant's) application did not receive full, thorough and impartial consideration by the Medical Advisory Board, by the Credentials Committee, and by the Board of Governors itself...."

Since this finding was not impugned in the subsequent proceedings before the Divisional Court, it should be assumed that counsel's statement did not have any evidentiary basis.

As to the statement attributed to a representative of the hospital's Board of Governors, that statement is apparently in justification of the "closed hospital" system, and contains no necessary implication of a condonation of favouritism.

To put it summarily, the Ministry's position is that, given the recency of the Grange Committee's Report and the absence of a significant body of criticism of the existing system, and given the tentative nature of the Ombudsman's comments -

"...situation which could be described...."

...it appears that there may have been an element of improper discrimination...."

there is insufficient justification for establishing a full-scale inquiry at this time.

#### COMPOSITION AND QUORUM OF THE BOARD

Briefly, the Ministry's view is that

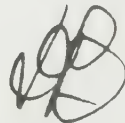
1. in any hearing by the Board, the quorum should be broadly representative of the interests involved in the issue;
2. previous experience on or professional connection with a hospital board is not necessarily inappropriate for at least the majority of members of the Hospital Appeal Board;
3. appointees to the Board - whatever their professional status or past experience -

4.

should be chosen with an eye to their sense of balance and fairness to all interests;

4. the Ministry is contacting the Chairman of the Hospital Appeal Board, to ascertain that he assents to the desirability of a representative quorum at all hearings (the Ministry hopes to be able to report that assent when it appears before the Select Committee): that assent would obviate the need for legislative amendment at this time;
5. while ideally the legislative provision respecting a quorum of the Board should perhaps be amended, the Ministry does not anticipate being able to include a provision of this nature in its legislative program for the forthcoming Session.

DB:sh



David Bernstein, Q.C.



**HOSPITAL PRIVILEGES**

by

**The Honourable Mr. Justice Grange**

**Mr. Justice Grange:** It is not quite four score and seven years ago but at least four, and it seems more than that, since Hospital Privileges came into my life. Before that, if I thought of the words at all, I associated them vaguely with private rooms and baths for the ailing rich, or perhaps, in more romantic moments, with nocturnal visits for the less ailing to the nurses' residence.

All these innocent thoughts were shattered when I became involved with the Minister's Committee of Inquiry into that particular subject. The inquiry was promoted because of the difficulties that two doctors were having in obtaining privileges in one metropolitan hospital. There had, of course, been many others before who had encountered difficulties of that nature, but these were men of persistence and determination -- the kind who have done so much in the past to redress unjust laws -- and brought to the attention of nearly everybody, and particularly the medical profession, "The Globe and Mail" and the Minister of Health, that not only was there no way under the existing law to give them the relief they sought, but no way even to inquire into whether they were entitled to such relief. Therefore, the minister appointed his old classmate at Osgoode Hall -- in Texas they call it cronyism -- to look into the matter and report, which I did, in association with some very able medical, legal and lay people who were appointed on merit.

The terms of reference were somewhat broader and we considered many other aspects of hospital life, but the main problem discussed, and eventually therefore our main concern, was the right or privilege or whatever you might call it of a doctor to be able to carry on his profession in association with and using the facilities of the hospital of his choice. We were committed, both in our hearts and in our instructions, to keep the public interest foremost, but the pursuit of that interest sent us, like Stephen Leacock's Horseman, madly off in all directions.

The problem lay in so many competing claims, the most obvious of which were those of the applicant/doctor and the hospital to which he was making application. As we put it in the report:

"We start with two propositions which, however desirable, are unfortunately to some extent incompatible. These are as follows:

1. A doctor should have privileges in the hospital of his community. The benefits to the doctor in the development of his skills and the widening of his practice by association with any hospital are obvious, but it is also of immense convenience to him and his patients to be associated with the hospital of their community.
2. A hospital should have the right to decide who should be on its staff. This, too, is obvious because it gives the hospital the opportunity to create a better hospital and a better place for the care of patients.

To resolve these sometimes incompatible propositions requires us to consider the claims of all the persons and bodies concerned. The commonest cliché in both oral and written presentations made to us was that 'hospitals are for patients'. The proposition is, of course, unassailable, but it does not go far enough. It does not even distinguish between patients, because the interests of patients in the hospital may run counter to the interests of those patients who are prevented from getting in by the hospital policies. We believe that all of the following have certain claims to consideration, and it is our object to satisfy their claims as best we can. These claimants are:

- (1) patients, in hospital; in the community;
- (2) doctors, on staff; wishing to be on staff;
- (3) hospitals, including the boards of trustees, administrators and all the people they represent.

Dealing with the claims of these claimants in detail, we appreciate that, like the original propositions, they are not always compatible. The claims are as follows:

**(1) Patients**

Patients in a hospital have a legitimate claim to the best treatment that the hospital can arrange. The people of a community have a legitimate claim to be treated in the hospital of their community, at least to the extent of the services available.

**(2) Doctors**

Doctors practising in the community have a legitimate claim to be able to conduct their practices in association with the hospital of the community. Certainly they have a right to natural justice and the appearance of natural justice in the process of their application to be appointed to the hospital.

Once a doctor is appointed to the staff of the hospital, he has a claim to privileges (and associated responsibilities) in the hospital commensurate with his competence and no deprivation of those privileges without just cause, and he has an arguable claim to protection by the hospital so that his skills will be maintained and possibly even so that his volume of work and income will be adequate.

**(3) Hospitals**

Hospitals have a right and even a duty to arrange a smooth, functional efficient unit to best serve the needs of the community.

It will be readily seen that some of these claims are diametrically opposed to others. The claims of the hospitals and the doctors on staff and the patients within the hospital, all suggest a 'closed hospital', where new doctors are admitted to staff only with great care. The interests of doctors who are not on staff but practising in the community, and, perhaps to a lesser extent, the patients of those doctors, require the appointment of those doctors to the staff of the hospital, and with each appointment, the right of the patients of that doctor to be treated by him in the hospital of the community."

This was indeed the open and closed hospital controversy upon which each side can be so vociferous and so uncompromising. We struggled with the problem but we could not solve it or reach any conclusion as to who was right. Speaking for myself, I doubt if it will ever be solved because conditions vary too much from case to case, from hospital to hospital and from jurisdiction to jurisdiction.

We did, however, recognize that the cards were heavily stacked against the applicant/doctor and for the closed hospital. The procedure roughly stated was that the application went before the Medical Advisory Committee composed of doctors already on staff and their recommendation allowing or denying the application was rarely, if ever, reversed by the hospital governing body, the Board of Trustees. Indeed, there was some doubt whether the Board could legally do other than follow that recommendation.

Our report proposed that the Board of Trustees be given the power to override the Medical Advisory Committee recommendation and that the rules be amended to encourage them to do just that in appropriate circumstances. The trustees of hospitals have done yeoman service to the hospitals and to the community. They are admittedly not well equipped to determine medical questions such as might be involved in an appeal from the Medical Advisory Committee but they have broad general knowledge which could be used to great advantage if only they were given a chance to exercise it. Under our proposals there was to be a hearing by that body with the applicant (and the Medical Advisory Committee) having a right to be heard under rules designed to make that hearing as independent as possible. It was our hope that many of the disputes would be resolved at the hearing before the Board of Trustees and perhaps this has been so.

We recognized, however, that inevitably the trustees would be influenced by the Medical Advisory Committee and if justice were to be done an independent appellate body was required. Our



most important proposal, therefore, was the creation of a Hospital Appeal Board with decisive power to review and reverse or amend any decision of the Board of Trustees or the Medical Advisory Committee.

That body in due course came into existence and has been operating busily ever since. Of the four cases of which I am aware, the Hospital Appeal Board has decided two in favour of the applicant/doctors and two in favour of the reluctant hospital, which, if nothing else, shows a remarkable degree of even-handed justice. The story has a rather unhappy ending, because the two rejected doctors were indeed the two persistent applicants who started the whole thing off in the first place. Such is human self-concern that I doubt they got much comfort from the knowledge that they have assisted some of their less persistent colleagues.

There are two features of the legislation that I must mention because I want to deny paternity. We looked upon the problem as essentially a factual one and recommended that the Hospital Appeal Board contain one legal person, one lay person and three doctors, because we believed the major conflicts would be medical and that doctors would be the best people to resolve those types of conflicts. Some people were critical of that proposal, saying doctors would all act and think together. In our experience nothing was further from the truth. Their opinions were often violent but seldom identical. Our only reservation about doctors on the Hospital Appeal Board was contained in these words:

"We may say, however, that we do not believe these doctors should be representatives of any particular school of thought within the profession, or be accountable to anyone but their own consciences for their decisions. No doctor can, of course, be without views on the issues that have been presented to this committee but our firm belief is that each case must be resolved upon its own facts and circumstances, and the resolution is not assisted when the judges come to the hearing with the fixed, polarized positions of the organizations they represent."

Certainly we did not intend to establish any further appeal, if only because of the enormous cost to the doctor of the litigation, even though doctors earn more than anybody, even mailmen. For the hospitals we were not so concerned because they are now essentially funded from the public purse.

I was not consulted on the legislation and there is no reason why I should have been, particularly as my classmate was no longer Minister of Health when it was drafted. Anyway, our views as to the composition of the board were not carried into the amendment to *The Public Hospitals Act*. The legislation reduced the number of doctors from three to two and increased the lay members from one to two, adding that one of the latter should be a member of a hospital board. It is perhaps not of earthshaking importance but I can only conclude that the new minister and his advisors either did not like our recommendations or missed the point entirely.

More importantly, an appeal both as to fact and law was given to the Divisional Court with no appeal as to fact from it. The first case to go before the Divisional Court was taken by the hospital and concerned questions of competence and arrogance. The hospital alleged the doctor/applicant had too much of the latter and not enough of the former. The Divisional Court reversed the Hospital Appeal Board on both these factual issues, demonstrating that the final decision on fact rests not with the three doctors we had proposed but with three judges. There are some unkind people who might suggest that on any question of arrogance a member of the Divisional Court is as good a judge as any. But I cannot see their qualification on the more frequently presented problem of medical competence.

Somehow I am not expecting a sympathetic response to this complaint from Mr. Williston. He was, after all, counsel for the successful appellant before the Divisional Court in the case I referred to. Anyway, these personal opinions of mine are subject to change in circumstances that I leave to your imagination.

**RESPONSE TO PRECEDING LECTURE**

by

**Walter Williston, Q.C.**

Mr. Williston: I would like to start off by saying that in my opinion this Act or the amendments to *The Hospitals Act* is an advanced piece of social legislation. Years ago hospital privileges in the larger cities were restricted to a privileged few and social and religious prejudice was predominant in selection for hospital staffs.

Against that background the Act is to be highly commended. However, it does suffer from indecision on the vital points involved in the Act on the part of those who sponsored it, who were faced with the three following choices.

One, to have an open hospital system such as exists in some states of the United States, whereby any qualified physician could have the right to a hospital bed or to use other facilities of the hospital.

Two, to have a semi-open system, whereby any doctor practising and having an office in the community would have those privileges. There are strong arguments in favour of such a system. Hospitals today are paid for by public funds. The patient and the doctor are being discriminated against if the latter is not allowed to admit his patient to the hospital except under the auspices of some other doctor who may not be as qualified as he is.

The third and traditional concept is to have a closed hospital system, whereby the doctor must be appointed to the staff before obtaining hospital privileges. The arguments in favour of that system are also of weight, including maintenance of a high standard. There is also the question of excellent supervision of the doctors on the staff. Certainly there is ease of administration when there are only a certain number of hospital beds, for it would be very difficult if doctors could indiscriminantly assign patients to them.

The necessary ingredient of the open hospital system is that the Board of Governors or the Board of Trustees who have the responsibility for running the hospital must also have the ultimate responsibility of choice of staff. If, as can happen now, the Ontario Hospital Board has the right to substitute its opinion for the opinion of those responsible for the administration of justice, the result is either anarchy or a totalitarian system, because the Ontario Hospital Board, as qualified as it is, does not have the facilities to judge who should be on the staff. Not having the courage, if I can use that word, to advocate an open hospital system, in the event we have a hybrid system which, unless the functions of the Ontario Hospital Board are more clearly defined, will, in my respectful submission, be a constant source of irritation and ultimate litigation.

At present, if a doctor wants hospital privileges, he first goes before the advisory staff which is in no sense judicial or semi-judicial; it does not have to hear him, and can make its decision without evidence, but if the doctor is turned down by that Board, he has the right of appeal to the Board of Governors or the Board of Trustees.

The Act is very careful to preserve his rights to have an independent hearing before the Board of Trustees or the Board of Governors. There can be no communication between the advisory staff or its counsel and the Board of Governors on the matter of issues. What then can be considered sufficient reasons for the Board of Governors to turn the applicant down?

The first one could be that there is no opening available and that may be subject to question, since persons on the advisory staff may be interested in not having too many competitors on the staff. I do not think that issue has ever been tested in the Courts.

The second ground could be that another applicant is more suitable, which judgment somebody has to make. I would think that the best persons to do so would be the persons who had the responsibility, i.e. the Board of Governors.

A third ground is lack of competence, which is a very difficult thing to prove and I do not think it is usually attempted. No one acting for the hospital wants to make such a charge because it would immediately have to be reported to the College of Physicians and Surgeons. A more familiar attack is not that the doctor is incompetent but that he does not have the degree of excellence required by the particular hospital. That, of course, is much easier to maintain and does not affect so directly the integrity or competence of this doctor. It may be merely that he has not had enough experience.

Another ground that is sometimes used is lack of compatibility with other members of the staff, sometimes paraphrased as "abrasiveness". Yet another reason for refusing could be that the applicant



had unfortunate personal habits such as indulgence in alcohol or drugs or overfamiliarity with the staff or patients. That particular ground, as far as I know, has not been tested.

When these matters come before the Board of Governors, that Board is in a good position to decide on those issues. The defect in the system at present, in my submission, is that if that Hospital Board makes the decision, there is a right of trial *de novo* before the Ontario Hospital Board. This leads to a great deal of publicity as it is not held *sub judice*. The doctor can give press conferences throughout the trial. This kind of a trial brings discredit to the medical profession, to the hospital and to the doctor himself. It becomes a very nasty and bitter fight, and also an expensive one.

Mr. Justice Haines said in discussing the *Schiller* case that Schiller's costs were \$40,000 or Schiller claimed that they were. May I correct that, having acted for the hospital; the Divisional Court awarded costs, I disclaimed any costs, and I have never taxed any costs or asked for any costs. But there was in this case and in all such cases, a full dress trial lasting two to three weeks. Eminent doctors are called on both sides to prove whether or not the person is qualified. My criticism is the lack of weight that the Hospital Board gives to the decision of the people who are responsible for the conduct of the hospital.

In the case of Dr. Schiller, which came before the Board of Governors, counsel for the doctor said in effect; "We have no confidence in your opinion; do not want to present any evidence to you; we disclaim calling any evidence; we will wait until we get before the Ontario Hospital Board and we will show you where you get off." It is that kind of an attitude that makes this system unworkable. In my submission there will be constant trouble unless the appeal from the Board of Governors to the Ontario Hospital Board is limited to an assertion that the trial was not fair, or that the Board did not obey the rules of natural justice, e.g. the right of cross-examination was denied or there was a mistake in procedure. By having the trial *de novo*, a machinery is built up that is not helping the medical profession or the hospitals.

It is my submission that the functions of the Ontario Hospital Board must be clearly defined to avoid trouble. Unless the circumstances of appeal are laid out, this hybrid sired by my learned friend, now my lord, will be a very expensive and inefficient mongrel.

Mr. Sharpe: For those physicians who may not be familiar with Mr. Williston, he received a Q.C. in 1954 and is presently serving as a Bencher of the Law Society as well as a member of the International Commission of Jurists.

Before getting into the question and answer format of the panel, I would like to ask the other panellists if they would care to say a few words and with this in mind I will introduce them, and ask the question at the same time. The third gentleman on my immediate right is Mr. Julian Porter, counsel to the College of Physicians and Surgeons. Mr. Porter?

Mr. Porter: The reason I am here is that I was associated with three out of the five cases before the Hospital Appeal Board at one stage or another, all of which, partially due to my tutelage, lost; of course the *Schiller* case was ultimately reversed. One doctor in Ottawa did succeed, with a flimsy case against him, but for some reason unknown to me, even though he was appointed by the Hospital Appeal Board to the hospital in Ottawa, he did not pursue the application even though he succeeded. I can surmise but I have no idea why, so my point to you as lawyers, speaking to the legal profession, is what do you do if a doctor comes to you and wishes to get into a hospital? My experience would tell me that it is almost a hopeless case and that unless there is something grievously wrong, it is a mistake to send a doctor through the long tunnel of slander. He will fail, because the Board or the courts will turn him down if there are defects in his personality.

The central fort that the Board has found is that a hospital has the right, in light of the catchment area that it is serving, to pick very select forms of staff and so, as Mr. Williston pointed out, it can say you are competent but we want someone with peculiar specialties: "Your specialty in cardiology as an internist is already properly represented so we do not need you." That answer is an almost impossible one to beat, and the Board has the right to decide on the specialties it wishes.

Then there are the little things, e.g., if you are presently on the staff, you can be removed

because there are all kinds of by-laws in the hospital which require you to attend innumerable meetings of staff. If you don't, that is most probably a valid reason for kicking you off the staff. That in itself prevents a doctor from being active in more than two hospitals at once, because of duplicate staff meetings that he must go to.

Another great skill in the land of medicine, and I suppose in any other land, lies in the letter of reference. What may appear at first blush to be a positive letter of reference really is not in terms of medical art and skill, and you must distinguish between the letter of reference written just to satisfy the request of writing one and the letter of genuine praise. Most often by the time a doctor has applied and comes into your office, the letters of reference are written. I have never yet known a doctor who would phone up the potential giver of a letter of reference to check what is going to be said, or who has taken the time to go and talk to him. Nor have I known one who has had enough courage to say to the potential writer of the letter of reference, "Let me see it first and if I don't like it, don't send it." If you ever do represent a doctor, make very sure that you shop about for a proper letter of reference.

I think that the legislation reflected the flaws in Mr. Grange's report, and I think that there are some almost impossible problems. The Hospital Appeal Board and the courts inevitably view the hospital as an extended heart transplant machine. They view it as a great subtle mechanism, when in fact it is an enormous, bustling, garrulous, irreverent factory with everybody fighting and scratching to get in. When you are in front of a Hospital Appeal Board or the courts, every case involves life or death and every case requires the sensitive choosing of personalities.

When you look at hospital privileges you must examine carefully, because it is a subtle area, what privileges the people in the hospital in fact get. Some hospitals give family practitioners enormous privileges to do obstetrics and gynaecology and minor surgery. Other hospitals only give a family practitioner the right of admission and perhaps the delivery of babies, but if it is at all complicated or a first baby, then the specialist must take over. The real problem in looking at hospital power depends on what privileges the existing people are given and how those are divided and that is incredibly complicated.

Finally, something that neither the Grange Committee nor anybody else could really solve, is the fact that the Board of Governors, although it must — and I agree in law and in common sense — determine who is on its own staff, is not likely to reverse the decision of its own Medical Advisory Committee. In my experience in arguing cases before the Board of Governors of hospitals, I feel that the Board may listen to three or four hours of your eloquence, but in the back of their minds they are just waiting long enough to find a reason to support the Medical Advisory Committee. It is expecting too much to have the Board get into an open fight with its hospital chiefs, the Board being lay people, over their version of competence or abrasiveness, and I do not think a Board will ever reverse the medical advisor.

**Mr. Sharpe:** On Mr. Porter's right, Professor R.J. Gray, Professor of Law at Osgoode Hall Law School. He became a Bencher in 1974 and teaches a seminar in law and medicine at Osgoode Hall.

**Prof. Gray:** I would like to make two or three points which I think are pretty minimal. What surprises me, a couple of years or more after the creation of the Hospital Appeal Board, is the small number of cases the Tribunal has actually had before it. It may be that the whole effort has been directed at a problem that does not exist on a large scale. I think, however, it may exist increasingly in the future.

My other point is, I thought Mr. Williston was originally hearing the sound of jackboots coming directly behind the Hospital Appeal Board, if there was no way of going beyond the Appeal Board to the courts. From his later remarks, I take it that he wants to restrict those reasons for going beyond the Appeal Board to due process and natural justice matters which I believe is probably what the Grange Committee had in mind. Since Mr. Justice Grange worries about the way the cases seem to bring the courts in more than he had anticipated, then he could well live with the views that Mr. Williston put forth.

It seems to me, though, a matter of some importance — if there is any criticism of the report and



of the Act – that somehow after pointing out the criteria that play or should play a part in whether or not privileges are given, everyone backed off and did not say that these were proper criteria to take into account and that one criterion is more important than another, and so on. We are left hoping for a common law to be developed by the Hospital Appeal Board or at least relying on their wisdom in some way or another to devise the right percentage of importance to attach to the various criteria. I think the time may be too short to leave that to the Hospital Appeal Board. There are going to be problems coming up that will not wait for a common law working-out of which criteria should be given weight and how much weight each should be given.

Let me look at two or three of the principal criteria that have been mentioned. The most obvious one is competence which everyone can agree on. The public and the patients deserve a competent hospital staff and the members of the staff themselves deserve competent colleagues. I would suggest to you it is not merely a patient problem as it is sometimes put, but quite likely in the not too distant future legally will be a liability problem to Hospital Boards. In other common law jurisdictions there has been a development towards looking to the Hospital Board itself for failure to screen the original staff appointments properly when some patient has a complaint at the end of the process, that they got less than the treatment they deserved. It would not surprise me to see some common law direction in our jurisdiction of that sort. This of course means it is all the more important that the Board is able to control who gets on their staff.

The second criteria that keeps getting fed into the mill, is the “personality factor”, what I think might be termed the SOB factor. I suppose there is no reason to expect greater amounts of SOB’s in the future than in the past so it is not a new problem that is going to come up. If people would attack the propriety of taking into account the personality of the individual applicant for privileges, talking about him as a nasty or lovable person or a team worker – I have even discovered in the groves of academe there are some SOB’s I would not like to have on my faculty – and one reads all the literature about the team approach going on in hospitals and the medical environment, then it seems to me all the more legitimate that some way or another that factor can be taken into account. These are not people who are going to be appointed to situations where they do not interact with their colleagues or where interactions with their colleagues are unimportant as to how well the hospital runs or the institution runs. If I as a doctor can avoid dealing with Dr. X who suffers from the SOB factor, everybody else in the hospital, the nurses, technicians and so on are going to be afflicted by him and this is likely to cause problems in the patient treatment within the hospital.

Another valid point is the numbers argument. Mr. Justice Grange remarked that hospitals are for patients, but that is being contorted to mean that patients are being denied their right to hospital entry if the doctor of their choice does not have privileges in the hospital closest to the patient’s home. The proponents of the open privilege position are entitled to use whatever rhetoric they can to embellish their case. I question whether it necessarily means that the patient is going to be denied a competent medical treatment in his locality even if his doctor cannot get privileges in the local hospital. What I think the proponents of that argument are saying is that every doctor has a right to choose wherever he wishes to practice free from the practical reality of whether adequate public facilities, i.e. hospital space, exists for him to successfully carry on that practice.

I suppose a strong case can be made that the “no place at the inn” reason for rejection is a bad one if it is taken in the sense that there are enough of us already on the staff, cutting up the pie of those who suffer from any particular malady, and we don’t need another one in the group or we will all suffer economically. However, it seems to me that it is not necessarily an unsupportable position. We have all kinds of professions in this province right now, from truckers to tobacco farmers, to which entry is restricted in one way or another, as a matter of good public policy, with the object in mind that those who are already in should be protected from severe additional economic competition.

I would not want particularly to argue the case in favour of that as the interpretation. It can have another meaning, i.e. that the physical facilities of the particular hospital in question simply do not have room for any more medical bodies to be running around the place. I am given to understand that that may not be the meaning of the numbers problem today, but tomorrow, if my reading of



demographic items is correct, we are going to continue to have a more or less steady population based in this country and province and we are inevitably going to have an increasing population of doctors even though I gather there are some efforts to cut off intake from abroad. The medical profession, I think, is like the legal profession, probably three-quarters of the doctors today who are in practice are people under the age of 45 and they aren't going to disappear all that quickly and there are an increasing number of people coming out of medical schools. Clearly then the no room numbers optimum numbers problem will be in terms of "We are using this plant at full capacity, there isn't any more room for you when you apply," a problem that is going to increase in the not so distant future.

Presumably the province has no intention of adding any physical facilities, at least certainly not on a basis that it is owed to every doctor who has graduated or is in a particular specialty to make physical space available to him. So I think there will come in greater numbers rejection cases and probably many more situations where people go to the Appeal Board. That being the case, it seems to me it would be helpful if the statute somewhere told us whether these are proper criteria to take into account or not and did not simply leave it to a working out of a common law of proper criteria before the Appeal Board.

**Mr. Sharpe:** Dr. Sawyer is doing double duty today. Have you anything to add?

**Dr. Sawyer:** I am at an age where perhaps I can be a little philosophical for a moment. In the year 1949 I was asked by the Board of Directors of the Ontario Medical Association to chair the first Committee on Medical Staff Privileges. At that time there were very few hospitals that had medical staff by-laws and we had to scout around to find some and use them as a sort of model.

Contrary to what Mr. Williston said, and I think it was true in that day, doctors generally had no difficulty in getting hospital privileges in the community in which they were practising. The object of the exercise I was asked to perform with my committee, was to regularize what had been going on into some sort of a system that the doctors could use to screen initial applications. More particularly, the interest was in the granting of privileges and methods whereby hospitals might give privileges to the various doctors on their staff.

There was no problem across the province so far as community hospitals were concerned, and that was all we were interested in. We did not touch University hospitals, which had particular problems. We drafted by-laws for intermediate and small hospitals and I think perhaps it is true today that across the province generally there are not many problems with hospital privileges. If a doctor goes to a community he usually gets privileges in the community hospital. He may not be happy with the privileges he gets, but he usually gets them.

What then has been the growing problem over the last 25 years? If you look at the cases that have come before the Hospital Appeal Board, they involve a particular type of hospital, by and large hospitals that have been built in the last 25 years around the periphery of the large metropolitan area. They are not really community hospitals.

If you look at the way they were set up, the Board of Governors was chosen initially because it was hoped they would be able to raise money for the hospital. They were not necessarily residents of the community in which the hospital was situated. When they set up the medical staff, they imported doctors from the downtown University hospitals so that they were not really members of the community around which the hospital was situated. More than that, I think these hospitals had a little difficulty in deciding what their role was. The ordinary hospital in a community outside of a large metropolitan area is there to serve the needs of the people, the Board of Governors are chosen from that area, the medical staff from the staff around that area and they know the role and function and needs of the hospital.

I am not too sure that the hospitals where the problems have arisen have a community interest in their role. As I view it, and I could be wrong, part of it is to serve people in the community and part of it is to be a referral centre much like the University hospitals from which much of their staff was recruited. This leads to questions of status, and of excellence, and to seeking out doctors with particular skills to fill certain positions. I do not know what the answer is but it seems to me that this is one of the problems.

I have a couple of other comments to make, because I have listened to discussions about hospital privileges for 25 years or more and I have heard the same things said many times, but there are some questions that I have had that I do not quite understand. Some of them arose out of the initial report that we wrote. We had courtesy privileges for instance and we looked at courtesy privileges in those days largely as doctors who were practising in outlying communities from the centre where they could not always get in to see their patients in an emergency. They had to have some doctor in the town signify his willingness to be on call if his patients needed attention. It was difficult for them to attend hospital rounds and the meetings that Mr. Porter spoke about. Then there developed a system involving an inner group of active doctors and the courtesy staff could not have votes or hold any office.

It seems to me that if the Board of a hospital wants advice from the medical staff, they should get it from the whole medical staff. For instance, a problem you have in some hospitals is the allocation of beds. If a man has not a vote and does not hold office, how does he get his legitimate complaint before the Board of Governors and have it heard in an understanding sort of a fashion?

For my sins this year I am studying administrative law and we have been considering the question of natural justice and going over the cases. Those interested might read a couple of cases with which Mr. Justice Holland was associated. One is *Re Cardinal and the Commissioners of Police of Cornwall*, [(1974) 42 D.L.R. (3d) 323] in which he gave the majority opinion of the court, and the other is *Re Robertson*, [(1974) 1 O.R. (2d) 548] in which he strongly dissented. He gathers up in the former the cases that have touched on this subject, such as *Ridge v. Baldwin*, [[1964] A.C. 40] which talks about one of the rights under natural justice being the right to be heard by an unbiased Tribunal. When you look at the composition of the Hospital Appeal Board you wonder what test to use to determine bias, whether you use the real likelihood test or the reasonable suspicion test, whether the ordinary person would feel that a doctor going before that Board was going before an unbiased Tribunal.

As Mr. Justice Grange has pointed out, in the four actual cases, two went each way. I do not suggest that justice has not been done by that Board but I wonder if it has seemed to be done. It seems to me that perhaps the function of the Hospital Appeal Board should be to make sure that the decisions are in the public interest and I am not too sure, with respect, that you need a lot of expertise to sit and listen to the case put up by one side and the case put up by the other and decide in the public interest of the hospital that is serving that community.

**PANEL DISCUSSION -- HOSPITAL PRIVILEGES**

**Panellists:**      **The Honourable Mr. Justice Grange**  
                         **Dr. Glenn Sawyer**  
                         **Professor R.J. Gray**  
                         **Julian Porter, Barrister**  
                         **Walter Williston, Q.C.**



**Mr. Sharpe:** We begin our questions with one directed to Mr. Justice Grange. It asks, to what extent have the amendments to *The Public Hospitals Act* reflected your committee's recommendations and what changes to these would you now like to see?

**Mr. Justice Grange:** I do not know. I mentioned in that long speech of mine that there were a couple of things I did not know. I have a tendency to close a file when the matter is completed.

I would like to say something in reply to Dr. Sawyer because it bears on this question slightly, that is the composition of the Appeal Board. I think the draftsmen were faced with a difficult problem.

We decided that there had to be some medical expertise on this question. The last thing in the world we wanted was to have people who were representative of some school of thought, that is the Hospital Board.

In fact it happened that almost all the members turned out to be either members or former members of the Boards of Trustees of hospitals. I think that that was a mistake. I may be wrong, I do not suggest for a moment that they have been unfair, but as Dr. Sawyer says, it does not look right and should not have been done. I think it may have been done to appease the hospitals who were the people who were least likely to be satisfied with the report because some of their power was being taken away from them.

We were very anxious to preserve and to strengthen the power of the Boards of Trustees and to that extent I agree with Mr. Williston, let us by all means if possible end it at that point. But like Mr. Porter I agree it is almost impossible to envision a situation where the Board of Trustees will not rely upon their own experts and Advisory Committee. That is the reason why we had the Hospital Appeal Board.

I hate counsel who don't answer a question. I don't think I answered yours.

**Mr. Sharpe:** The next question is directed to Mr. Porter. Should an abrasive personality be sufficient finding to prevent an otherwise qualified physician from obtaining a hospital appointment?

**Mr. Porter:** I don't know. Like Mr. Justice Grange I am going to wander, but I would have thought Dr. Sawyer, after three years of law school, would have had a greater discipline. I am sorry to see he has retreated to the usual medical fuzziness. However, it may make him a better advocate.

You know the whole point, and the Grange Commission saw it and only a few people would try to challenge this, the procedure was for the few, for the very particular. If I could use an analogy, if tomorrow a student could apply as of right for a position in a large law firm and had to be accepted after a hearing, can you imagine the young, recent graduate who had been turned down by Blake, Cassels & Graydon, then deciding he would go through two hearings and argue under all that publicity that he should be admitted?

It usually requires somebody who has an abrasive personality to try it in the first place. Mr. Gray uses the SOB concept. I assume that means "Son of a Bitch". More accurately, the thing that upsets other people on staff is not the SOB but the 45-year-old jerk. It is true that people on the Medical Advisory Committee have no experience in handling personalities and interviewing people. That requires enormous training and the kind of person who is going to take the appeal is by his very nature going to be abrasive.

Such a personality is going to cause problems all through the hospital. But I do not know how you quantify abrasiveness.

**Dr. Sawyer:** May I throw in a fuzzy thought?

Having talked to people on the Executive Committees of some of these hospitals, where they have had problems, it is very interesting to find that you cannot get a single doctor to say that a doctor should not have privileges in some hospital, just that they should not have privileges in their particular hospital.

Now my point is this, that some of the hospitals to which they would consign these doctors are not as sophisticated as the hospitals to which they have applied and it might be much more difficult for a small hospital to handle an abrasive personality than it would for some of the larger, more sophisticated hospitals.

**Mr. Sharpe:** Our next question is directed to Mr. Justice Grange. What do you see as the future role of the court in reviewing the findings of the Hospital Appeal Board?

**Mr. Justice Grange:** In a word, nil. I think that we have enough appellant procedure already. Obviously the court has to make sure that the Act is followed. Whatever the Act requires to be done is done; if it is done and the Hospital Appeal Board reaches a decision that should be the end of it. That is, on a question of fact, there should be no appeal.

Mr. Williston goes back one step further and says there should be nothing after the Board of Trustees of the hospital. I wondered what had happened when this extra appeal went in and I reached the conclusion rightly or wrongly that it just cements my ideas that this province has not for many years been run by the government or by the opposition or by the civil servants or by anybody else. It has been run and I am sure run well by James Chalmers McRuer and "The Globe & Mail".

**Mr. Porter:** Everybody in the legislative committee is in love with James Chalmers McRuer and if you stand up in front of them and say James Chalmers McRuer is not the Bible, he might have been wrong, as a judge, it seems a lot of things changed after he became Commissioner, they react violently against you and you lose any argument you make.

You know, Mr. Justice Grange is right. There are more Boards and more Tribunals that are leading on to the valley of their lordships than you will ever believe.

**Mr. Sharpe:** Mr. Williston, what ramifications do you see from the point of view of liability of a hospital for negligence of a doctor when that doctor is placed on the staff by order of the Hospital Appeal Board, overruling the decision of the Board of Governors of the hospital?

**Mr. Williston:** I don't think it would make any difference. The chances are that the fact that he is a member of the courtesy staff would not make him a servant or agent of the hospital in performing an operation. I do not think the means by which he is appointed, even if he was made a direct servant of the hospital, could be taken into consideration.

**Mr. Sharpe:** Professor Gray, anything to add to that?

**Prof. Gray:** I referred to that problem earlier. There are cases down in the U.S. where courts have somehow got past the notion that doctors, although they are members of the staff when they are performing their work as doctors, are ordinarily independent contractors in legal terms. Therefore, liability does not ordinarily flow through to the hospital for their errors and omissions. That might be something that will be taken up by our courts.

In regard to the specific situation where the Board of Trustees approves somebody that should have been screened better, I would think in our jurisprudence that liability would fall on the Hospital Board for failure to do its screening job properly, which is not the law now as I understand it.

If they had been forced to take somebody that they thought was not up to their competence levels, maybe they could go back and sue the Chairman of the Hospital Appeal Board. There should be some kind of an out for a hospital if they were taxed that they had somehow allowed a less than competent person to have staff privileges, when they obviously had been refused in the first place.

**Dr. Sawyer:** If you are going to get into the theoretical, look at the other question of the patient who has been going to a doctor, gets into a serious problem, the ambulance, as is its wont, takes him to the nearest hospital, the patient asks for his own physician, the hospital says sorry, this physician is not on our staff. If the treatment given at the hospital turns out badly, can the patient sue the hospital because the hospital refused to let him have his own doctor in an emergency situation?

**Mr. Sharpe:** One final question for Mr. Williston. In view of comments made earlier that the decision of the Hospital Board will seldom differ from the recommendation of the Medical Advisory Committee, is the right to a hearing at the Board of Trustee level an empty right in your view?

**Mr. Williston:** I do not in any way agree with the premise on which the question was based and my experience has been the exact opposite to that of Mr. Porter. I have been consulted many times by the

Boards and I have found them extremely interested in the rights of the hospital and very conscious about the application before them. They do not rubberstamp their Advisory Committee but the whole procedure makes that Advisory Committee look very carefully before they turn somebody down because they know they are no longer going to be rubberstamped. My experience with Hospital Boards has been the exact opposite of what Mr. Grange expected and what Mr. Porter interprets.

**Mr. Sharpe:** Thank you, gentlemen, for participating in the panel today.

We now come to the final portion of our programme, the field of Law and Psychiatry, which has been assuming greater importance within the last few years. We have a very distinguished panel of experts in the field.

Our first speaker, Mr. Justice Haines, was called to the Bar in 1930 and was made a Queen's Counsel in 1942. He was associate professor of Trial Procedure at the University of Toronto Law School for 13 years, was elected a Bencher of the Law Society of Upper Canada in 1951 and continued as a Bencher until appointed to the Supreme Court of Ontario in November of 1962. He is the former Dean of the International Academy of Trial Lawyers, a past president of the Toronto Medical Legal Association and now honorary president.

He has held the position of Ontario president, chairman of the insurance section, chairman of the Public Relations Committee and chairman of the Medical Legal Committee of the Canadian Bar Association. He is an honorary fellow of the Academy of Medicine of Toronto and he is the only Canadian member of the American Law Institute. He is an honorary life member of the Toronto Academy of Medicine and honorary life member of the Ontario Medical Association and the Ontario Psychiatric Association. As well, Mr. Justice Haines is chairman of the Lieutenant Governors' Advisory Review Board.



W. R. RIDDELL  
SOLICITOR AND  
GENERAL COUNSEL



THE WORKMEN'S COMPENSATION BOARD  
ONTARIO

*Exhibit No. 5  
Filed February 26/79  
A. McAdams  
Clerk*

February 19, 1979.

The Honourable R. Roy McMurtry,  
Attorney-General,  
18 King Street East,  
Toronto, Ontario.

Dear Sir:

As I am sure you are no doubt aware, the Select Committee on the Ombudsman has recently released its Fifth Report. The Board has some concerns with respect to certain recommendations contained in that report and I have been instructed to seek an opinion.

One of the primary areas of concern is with Recommendations 29 and 37 (copies attached).

The Board is concerned with the implication of implementing these specific recommendations.

Section 74 subsection 1 of The Workmen's Compensation Act sets out the general jurisdiction of the Board:

"The Board has exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part and as to any matter or thing in respect of which any power, authority or discretion is conferred upon the Board, and the action or decision of the Board thereon is final and conclusive and is not open to question or review in any court and no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceeding in any court or be removable by application for judicial review or otherwise into any court."

Section 75 empowers the Board to reconsider. The section reads as follows:

- 2 -

"The Board may, at any time if it considers it advisable to do so, reconsider any decision, order, declaration or ruling made by it and vary, amend or revoke such decision, order, declaration or ruling."

The concerns of the Board are as follows:

- (1) If the Board does not believe that it should properly change a decision, does the Board have the authority to reject the recommendation?
- (2) If the Board does not have the authority to reject the recommendation, can it subsequently entertain an application under section 75 by an interested party?
- (3) If the Ombudsman acts on his own motion under section 15 (2) of the Ombudsman Act rather than on complaint of a party and his recommendations are upheld by the Committee, the Board is concerned with the recommendations' interaction with the appeals system in that there is no appeal to deal with, but persons ordinarily parties to a hearing will be adversely affected by the implementation of the recommendation. The Board is also concerned that a court might well find that the party adversely affected had been denied natural justice.
- (4) If the Board feels there is merit in the recommendation, is it bound to grant a hearing to any party who might be adversely affected by the recommendation, and if the Board holds such a hearing and reaches a conclusion different from the recommendation, which does it implement - its conclusion or the Committee's recommendation?

Yours very truly,

WRR/GMW  
Enc.



**The Workmen's Compensation Board**

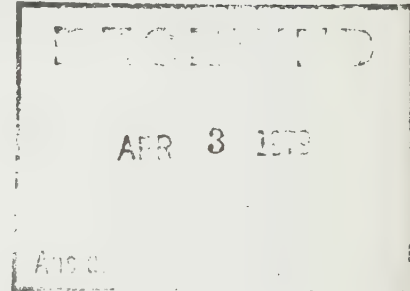
2 Bloor Street East, Toronto, Ontario M4W 3C3

Telephone (416) 965-892

**G. W. Reed, Q.C.**  
Vice-Chairman of Appeals

March 30, 1979

Mr. J. Bell  
Counsel  
Select Committee on the Ombudsman  
c/o Shibley, Righton & McCutcheon  
Barristers  
401 Bay Street  
Toronto, Ontario



Dear Mr. Bell,

Re: Recommendations 29 & 37 of the Select  
Committee's Fifth Report.

You will recall that in connection with the above recommendations, the Board filed with the Committee a copy of a letter addressed to the Attorney General and dated February 19, 1979. The opinion of the Attorney General was received yesterday by the Board's Solicitor and General Counsel.

In accordance with our undertaking to the Committee I am enclosing a copy of that opinion for your information.

Yours sincerely,

GWR/eb

Encl:





Office of the  
Minister

Ministry of the  
Attorney  
General

416/965-1664

18 King Street East  
Toronto Ontario  
M5C 1C5

March 15, 1979

Mr. W. R. Riddell  
Solicitor and General Counsel  
The Workmen's Compensation Board  
2 Bloor Street East  
Toronto, Ontario  
M4W 3C3

Dear Mr. Riddell:

I wish to acknowledge your letter of February 19, 1979 regarding the Fifth Report of the Select Committee on the Ombudsman.

In your letter you indicate four concerns of the Board. The following are my comments with regard to these concerns.

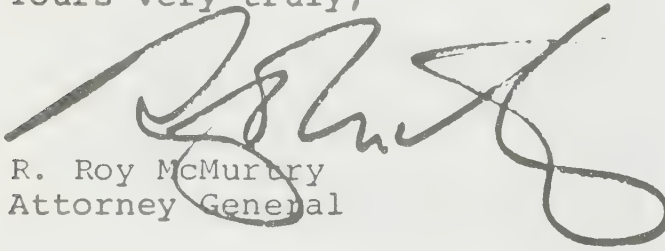
The Select Committee's terms of reference empower it to review the Ombudsman's reports, report thereon to the Legislature and make recommendations which the Committee deems appropriate. Therefore, with regard to your first question, the Committee's recommendations concerning decisions of the Workmen's Compensation Board are not binding on the Board. The recommendations of the Committee must be implemented by legislation or by the Board itself. The Board may determine that it should not comply with a recommendation of the Committee.

Since my answer to your first question indicates that the Board has some discretion as to how or whether it will implement the Committee's recommendations, your second question does not require a response.

I am advised by my Crown Law Officers that the situation you refer to in your third question has not arisen in fact. If such a situation arises, a determination of the Board's position should be made at that time having regard to the particular circumstances of the case.

If the Board intends to give effect to a recommendation of the Committee in respect of a particular decision, the Board must reconsider its original decision under the terms of the Workmen's Compensation Act. Presumably, this will be done under section 75 of the Act. The rules of natural justice and/or the provisions of the Statutory Procedure Act, which ordinarily apply to action taken pursuant to section 75, will apply in a case reconsidered as a result of the Select Committee's recommendations.

Yours very truly,

A large, stylized handwritten signature in dark ink, appearing to read 'R. Roy McMurray', is written over the typed name and title.

R. Roy McMurray  
Attorney General



**The Workmen's Compensation Board**

2 Bloor Street East, Toronto, Ontario M4W 3C3

Telephone (416) 965-8920

**G. W. Reed, Q.C.**  
Vice-Chairman of Appeals

April 12, 1979

Mr. J. Bell  
Counsel  
Select Committee on the Ombudsman  
c/o Shibley, Righton & McCutcheon  
401 Bay Street  
Toronto, Ontario

Dear Mr. Bell,

re: Recommendations 29 and 37 of the Select  
Committee's Fifth Report

At its meeting on April 10, 1979, the Corporate Board discussed the opinion of the Attorney General dated March 15, 1979. Recommendations 29 and 37 of the Select Committee's Fifth Report were also considered.

It was the decision of the Board that the Appeal Board panel decision dealt with in Recommendation 29 should be reconsidered pursuant to the provisions of Section 75 of The Workmen's Compensation Act. The file will accordingly be referred to a new Appeal Board panel for reconsideration.

It was the further decision of the Board that Recommendation 37 not be accepted by the Board.

Yours very truly,

GWR/eb



SCHEDULE "6"

SUMMARY OF RECOMMENDATIONS  
CONTAINED IN THIS REPORT

1. Accordingly, the Committee recommends that the Ministry of Health consider what changes should be made to The Public Hospitals Act and Section 47 in particular, including changes in the quorum provisions and length of membership respecting the Hospital Appeal Board, to give better effect to the principle of a widely distributed membership of the Hospital Appeal Board. Further, the Ministry of Health cause an inquiry to be made into the provisions of The Public Hospitals Act to identify and to correct any acts flowing from Sections 44 to 50 of the Act which may be improperly discriminatory. (Page 12)
2. The Committee therefore recommends that the Legislature require The Workmen's Compensation Board to implement the recommendations of the Ombudsman made pursuant to Section 22(3) of The Ombudsman Act made to The Workmen's Compensation Board in Complaint No. 76 as reported in his Fourth Report to the Legislature by granting the complainant in question entitlement to the sum necessary to purchase the commercial type heating lamp which has previously been requested. (Pages 15-16)
3. The Committee recommends that the Legislature require The Workmen's Compensation Board to implement the recommendation of the Ombudsman made to The Workmen's Compensation Board pursuant to Section 22(3) of The Ombudsman Act in Complaint No. 79 of his Fourth Report by reconsidering its Appeal Board decision of March 4, 1976 and granting entitlement to the complainant on the basis of an aggravation of a pre-existing back

disability, to temporary total disability benefits from September 4, 1974 until such time as it is established that the complainant was medically fit to return to employment within the complainant's capabilities. (Page 16)

4. Accordingly, this Committee recommends that The Workmen's Compensation Board increase the complainant's temporary partial disability beyond 50% for the period March 2nd, 1968 to May 22nd, 1968 by an amount determined by the Board to be appropriate in the circumstances. (Page 20)

5. The Committee therefore recommends that The Workmen's Compensation Board implement the Ombudsman's recommendation by awarding the complainant a permanent disability award which would more adequately reflect the prevailing medical opinions as to the permanent disability resulting from the two compensable accidents. In making this recommendation, the Committee is of the opinion that this disability award should be something in excess of 20%. (Page 22)

6. Accordingly, the Committee recommends that The Workmen's Compensation Board implement the Ombudsman's recommendation by awarding entitlement to the complainant for the period of disability commencing June, 1973 and ending March, 1975. (Page 23)

7. The Committee further recommends that The Workmen's Compensation Board assess and determine the nature and extent of the disability benefits for the period in question which it considers adequate and appropriate in the circumstances. (Page 23)

8. The Committee therefore recommends that The Workmen's Compensation Board revoke its decision dated March 3, 1976 and order that the

complainant is entitled to a permanent disability award respecting the low back disability for the periods referenced in the Ombudsman's Report. (Page 27)

9. Accordingly, the Committee recommends that The Workmen's Compensation Board implement the recommendation of the Ombudsman by awarding the complainant temporary total disability benefits for the time lost at work as a result of the injury which occurred at work in July, 1976. (Page 29)







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# **SEVENTH REPORT OF THE SELECT COMMITTEE ON THE OMBUDSMAN**

**1979**

**TABLED IN THE LEGISLATIVE ASSEMBLY BY  
THE CHAIRMAN OF THE COMMITTEE  
PATRICK D. LAWLOR, Q.C., M.P.P.**

3rd Session 31st Legislature  
28 Elizabeth II





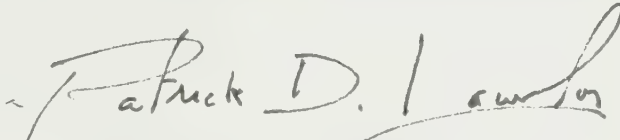
September 17, 1979

TO:


THE HONOURABLE JOHN E. STOKES  
Speaker of the Legislative Assembly  
of the Province of Ontario

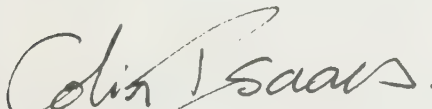
Sir,

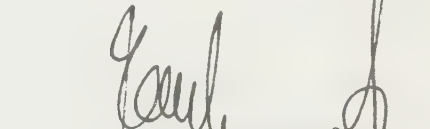
We, the undersigned members of the Committee appointed by the  
Legislative Assembly of the Province of Ontario on Tuesday, July 12, 1977, have  
the honour to submit the attached seventh report.

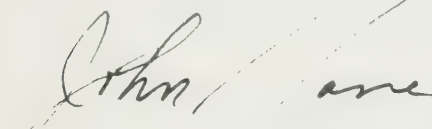
  
PATRICK D. LAWLOR, Q.C., M.P.P.  
Lakeshore  
Chairman


  
MARGARET CAMPBELL, Q.C., M.P.P.  
St. George

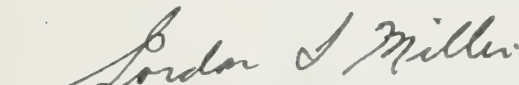
  
JOHN EAKINS, M.P.P.  
Victoria-Haliburton

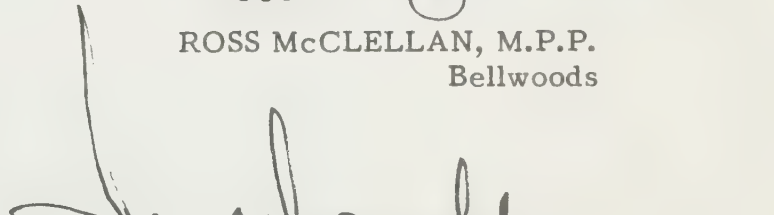
  
COLIN ISAACS, M.P.P.  
Wentworth


  
ED HAVROT, M.P.P.  
Timiskaming

  
JOHN LANE, M.P.P.  
Algoma-Manitoulin

  
ROSS McCLELLAN, M.P.P.  
Bellwoods

  
GORDON I. MILLER, M.P.P.  
Haldimand-Norfolk

  
JAMES A. TAYLOR, Q.C., M.P.P.  
Prince Edward-Lennox

  
OSIE F. VILLENEUVE, M.P.P.  
Stormont-Dundas-Glengarry





MEMBERS OF THE SELECT COMMITTEE  
ON THE  
OMBUDSMAN

PATRICK D. LAWLOR, Q.C., M.P.P.	Lakeshore
MARGARET CAMPBELL, Q.C., M.P.P.	St. George
JOHN EAKINS, M.P.P.	Victoria-Haliburton
COLIN ISAACS, M.P.P.	Wentworth
ED HAVROT, M.P.P.	Timiskaming
JOHN LANE, M.P.P.	Algoma-Manitoulin
ROSS McCLELLAN, M.P.P.	Bellwoods
GORDON I. MILLER, M.P.P.	Haldimand-Norfolk
JAMES A. TAYLOR, Q.C., M.P.P.	Prince Edward-Lennox
OSIE F. VILLENEUVE, M.P.P.	Stormont-Dundas-Glengarry

---

JOHN P. BELL

Counsel to the Committee

ALEX McFEDRIES

Clerk of the Committee



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## INTRODUCTION

On the 13th day of July, 1979, the Ombudsman presented his Sixth Report (October 1, 1978 to March 31, 1979) to the Speaker of the Legislative Assembly. The Committee considered this Report and other outstanding matters during eight days of hearings from the 23rd of July, 1979 to the 1st of August, 1979. During that period it heard from 29 witnesses and received 14 Exhibits.

On the 7th day of June, 1979, the Sixth Report of the Select Committee on the Ombudsman was tabled in the Legislative Assembly by its Chairman, Patrick D. Lawlor, Q.C. On the 21st day of June, 1979 the Committee's Report on motion by Mr. Welch, was considered by the Committee of the Whole House. The Legislative Assembly then received and considered the Report of the Committee of the Whole House which concurred in the nine recommendations contained in the Committee's Sixth Report. Thereupon the Legislature ordered that the Report of the Select Committee be received and adopted.

This marked the very first time in Ontario that the "Ombudsman Process" had reached the stage wherein recommendations made by the Ombudsman to various governmental organizations have been adopted by the Legislature.

In the Introduction to the Committee's Sixth Report it stated that:

"The purpose of this 'Special Report' is to focus the Legislature's attention solely on outstanding matters wherein recommendations of either or both of the Ombudsman and this Committee have been ignored or

refused. It is the Committee's intention that its recommendations in this Report will be individually debated and voted upon by the Legislature. Only when that has been done, will the Ombudsman's function have been completed. Only when that has been done, will this Committee's order of reference have been fulfilled."

The Committee believes that the Order of the Legislature on the 21st of June, 1979 adopting its Sixth Report and the support for both the Office of the Ombudsman and this Committee expressed by members of all three parties at that time, has elevated the office of the Ombudsman in this province, to a new level of effectiveness.

The Legislature has now demonstrated to the Ombudsman, the governmental organizations under his jurisdiction and to the people of the Province of Ontario, that in the appropriate circumstances the Legislative Assembly of the Province of Ontario will do everything within its competence to see that the Ombudsman's recommendations are implemented.

At the same time the Committee is mindful that the debate and consideration of its Sixth Report on the 21st of June, 1979 dealt more with expressions of support for the Committee's recommendations and the concept of Ombudsman rather than dealing in detail with the substantive issues raised by the recommendations. The Committee realizes the great burden and responsibility this places upon it during its deliberations wherein Legislative support is sought by the Ombudsman for one or more of his recommendations. The Committee wishes to assure the Legislature that it will continue to investigate exhaustively and review all aspects of Ombudsman reports before reporting thereon to the Legislature, particularly on matters of Ombudsman recommendations. This process will ensure that the Legislature, through this Committee,



before effectively approving and adopting a recommendation of the Ombudsman will have fully investigated, examined and thoroughly reported upon all relevant and appropriate issues.

This Committee is now confident that a procedure has been attained whereby the Ombudsman can attempt to invoke his "ultimate sanction" in such situations wherein a governmental organization has neglected or refused to implement a recommendation made by him in one of his reports. As will be discussed later in this Report (See Pages 1 to 9), there is some disagreement among members of the Legislative Assembly as to the legal force and affect of an Order of the Legislative Assembly adopting one of this Committee's reports.

The weight in law that an Order of the Legislature adopting a Select Committee's report and recommendations is, in the Committee's opinion, not the critical issue in this discussion. That critical issue is best expressed by the Attorney General in a letter to the Chairman of this Committee dated July 4th, 1979 as to what is "the best way to implement recommendations of the Ombudsman and the Select Committee.". Certainly the discussion should not be centred upon the possible consequences of a failure or refusal to implement such recommendations, but upon the "best way" that the governmental organizations affected thereby are to implement those recommendations.

The Committee hopes that any governmental organization affected by such a recommendation adopted by the Legislature, would be loathe not to implement that recommendation as quickly as possible. If that were not the case it would have a serious undermining affect on the integrity of the Legislature and the respect which all governmental organizations must have therefore. Certainly any governmental organization who embarks upon a technical "word

game" with respect to the legal affect of the legislative action is demonstrating a profound disrespect for both the concept of the Ombudsman in the Province of Ontario and the Legislative Assembly.

The extent to which these final stages in the Ombudsman Process remain to be refined and improved remains to be seen. It is the Committee's hope that the process as exhibited on June 21, 1979 will be all that is necessary to cause governmental organizations in the future to accept the opinions and recommendations of the Ombudsman and the will of the Legislative Assembly of the Province of Ontario.

The Committee and its counsel wish to express their sincere appreciation to the Ombudsman and his staff for their co-operation and assistance before and during the Committee's hearings. With this co-operation and assistance the Committee was able to quickly consider all material aspects of this Sixth Report within three weeks of its presentation to the Speaker.

This Report, in Part V, as with the Committee's Sixth Report, contains recommendations (No. 11, page 63; No. 12, page 66;) which support recommendations made by the Ombudsman to governmental organizations which were denied. While it is the Committee's wish that all of its recommendations herein be adopted by the Legislature, these particular recommendations must, at least, be dealt with in the same way as the nine recommendations in the Committee's Sixth Report. In other words they must be approved and by order, adopted by the Legislature.

PART 1

SEVENTH REPORT OF THE SELECT COMMITTEE

RESPONSES FROM GOVERNMENTAL ORGANIZATIONS  
TO RECOMMENDATIONS OF  
THE SELECT COMMITTEE IN ITS SIXTH REPORT

(A) INTRODUCTION

Of the nine recommendations contained in the Committee's Sixth Report eight were addressed to The Workmen's Compensation Board and one to the Ministry of Health. During the debate and consideration of the Committee's Sixth Report by the Legislature on the 21st of June, 1979 the Honourable Dr. Robert Elgie, Q.C., Minister of Labour did not comment in any substantive way to any of the recommendations. Rather he advised the Legislature that he intended to "listen to the will of the Legislature" as expressed by its order for approval and adoption.

The Minister of Health in responding to Recommendation No. 1 of the Committee's Report offered two proposals with regard to the recommendation. These proposals were outlined and discussed among members in a general way. Significant however and implicit by the Minister's response was an acceptance in principle of the Committee's recommendation.

Subsequent to the vote in the Legislature on the 21st of June last, the Attorney General expressed to the Chairman of the Committee his views respecting the legal effect of the act of the Legislature, which views he

expressed in a letter to the Chairman dated July 4th, 1979 (See Schedule "A"). The Committee discussed these issues with the Attorney General and members of his staff on the 31st of July, 1979.

The Committee understands the Attorney General's position to be that an Order of the Legislative Assembly adopting a report of this Select Committee which contains one or more recommendations, effectively supporting an Ombudsman recommendation that a specific course of action be implemented by a governmental organization, does not have the force of law and does not thereby place any legal obligation on the governmental organization in question or anyone else to implement that recommendation. Rather the Attorney General is of the view that only legislation passed by the Legislative Assembly places a legal obligation on a governmental organization to implement a recommendation.

With the greatest respect for the Attorney General, the Committee is unable to agree. The Legislative Assembly Act confers on the Legislative Assembly the power to make Orders in respect of, among other things, the acts of all persons who are concerned or affected by its proceedings. The Ombudsman being a servant of the Legislature is certainly one against whom an Order of the Legislature could be made which would legally bind the Ombudsman. The same can be said for Orders of the Legislature directed to the Clerk of the Legislative Assembly and his staff, the Speaker of the Legislative Assembly and all members of the Legislative Assembly sitting and/or carrying out functions of members.

The Ombudsman Act creates for the very first time a process whereby governmental organizations and their representatives may have their conduct reported to the Legislature by the Ombudsman. Where the Ombudsman



invokes this process paying scrupulous attention to the provisions of his Act, and thereby involves a governmental organization by directing a recommendation to it pursuant to Section 22 of The Ombudsman Act, the Legislative Assembly by Section 22(4) of The Ombudsman Act, is given jurisdiction to make an Order affecting that governmental organization where it has not implemented the Ombudsman's recommendation without adequate and appropriate cause.

If the Attorney General's position were the generally accepted one, then the authority over the Ombudsman's "ultimate sanction", and thereby the Ombudsman, would not rest with the Legislative Assembly, who created the Ombudsman, but with the government which retains the authority and ability to choose which legislation, however introduced into the House, is ultimately proclaimed as law.

The Committee realizes that this concept is new. For some it has a startling affect on our legislative process. The concept of the Ombudsman is historically foreign to the British parliamentary system. However, having been introduced into the system it creates certain powers and authorities to be exercised by the Legislative Assembly in the appropriate circumstances. One of those authorities is to require a governmental organization to implement, in the appropriate circumstances, a recommendation made by the Ombudsman.

These comments are not intended in any way to create a division between the Legislative Assembly and the Ministry of the Attorney General or to denigrate the opinions expressed by the Attorney General in his letter to the Chairman and as expressed personally to the Committee on the 31st of July. Rather they are intended to emphasize that the issue of the legal effect of legislative action in this context is by no means clear and unequivocal.

It is the Committee's hope that future actions by governmental organizations will make it unnecessary to extend this discussion. However, if governmental organizations hereafter decline to implement recommendations of the Committee adopted by the Legislature, then a full debate in the Legislature will be required to identify and settle upon the most appropriate and effective means to ensure that such recommendations will be implemented.

(B) MINISTRY OF HEALTH

On the 21st of June, 1979 the Honourable Dennis R. Timbrell, Minister of Health, advised the Legislature that:

"I am looking at the legislation which prescribes the composition of the Board, and their appointments at the present time or at pleasure, to ensure that all interests, including hospitals, physicians and the general public, are and will be fully represented both on the Board itself and in any quorum of the Board.

I am also considering the related issue of whether it is appropriate that a minimum number of the Hospital Appeal Board members should not have past experience as a member of a hospital board and, pending final decision as to what legislative changes are appropriate, if any - and we may be able to do it in the next re-arranging of the membership of the Board - I have sought and I have obtained the assurance of the Chairman of the Hospital Appeal Board that the full Board from now on will sit on all cases, except where the parties otherwise agree, or where a member must disqualify himself by reason of a conflict of interest."

The Honourable Minister further advised the House that:

"Nevertheless, what I propose to do is to obtain a comprehensive review or information as to what systems of medical staff appointments prevail in other jurisdictions. I intend to get this from the Ontario Council of Health; I will ask them to do the review. I believe that such information will be of great assistance in formulating an

appropriate approach to resolving this problem identified by the Ombudsman."

The Ministry's representative subsequently confirmed to the Committee that the Ministry intended to comply with Recommendation No. 1 of the Committee's Sixth Report.

With respect to the first part of the Committee's Recommendation No. 1, the Ministry advised that there are at present plans to change the appointment of Appeal Board members from the present system, which is at the pleasure of the Lieutenant-Governor In Council, to a system of time limited appointments on a staggered tenure basis.

The representative further described in some detail the inquiries made of the Ontario Council of Health by the Honourable Minister as set out in a letter forwarded to the Council on the 25th of June, 1979 (See Schedule "B").

It appears that the Ontario Council of Health was not made aware of the circumstances giving rise to this request nor was it provided with any background material which might be of assistance to it. The Committee understands that the Ministry of Health has no objection to providing the Council with certain background materials such as:

1. a copy of the Ombudsman's initial complaint summary;
2. transcript of the Committee's discussions of this complaint with the Ombudsman's Office and representatives of the Ministry, held in August, 1978;
3. relevant provisions of the Committee's Fifth Report wherein the particular complaint was reviewed (pp. 56-60 inclusive);
4. transcript of the Committee's discussion with the complainant, Dr. Claude McDonald on the 20th of March, 1979;

5. pages 3 to 12 inclusive of the Committee's Sixth Report;
6. the Hansard debates of the 21st of June, 1979; and
7. the transcript of the Committee's discussions with the Ministry representatives dated the 30th of July, 1979.

The Committee understands that this documentation will be forwarded to the Ontario Council of Health by the Ministry as soon as possible.

The Committee understands that the inquiries of the Minister as addressed to the Ontario Council of Health are not in fact the inquiry as contemplated by the recommendation. Rather it is a first step in an effort to gain necessary insights into the process in other jurisdictions which it is expected will assist in an articulation of the issues which the inquiry will address itself to. As at the 30th of July, 1979 the Ministry had not finalized the terms of reference of the inquiry beyond the letter to the Ontario Council of Health and it had not as yet designated to anyone the responsibility to inquire and report.

The Committee hopes that the Ministry will finalize all these necessary matters as quickly as possible and that in the Fall of this year the Minister can report as to the status of the inquiry and the progress of the Ministry's implementation of the recommendation.

(C) WORKMEN'S COMPENSATION BOARD

Subsequent to the Order of the Legislature on the 21st of June, 1979 the Chairman of The Workmen's Compensation Board, Michael Starr wrote to the Minister of Labour on the 26th of June, 1979 requesting specific direction from the Minister and the Government as to the Board's position vis-a-vis the Report of the Committee received and adopted by the Legislature (See Schedule "C").



On the 20th of July, 1979 the Minister wrote to the Chairman of the Board advising and directing the Board on a course of conduct vis-a-vis the Committee's recommendations. In that letter the Minister of Labour advised The Workmen's Compensation Board that it:

"must be particularly responsive to recommendations of the Ombudsman that receive the support of the Select Committee on the Ombudsman."

Further he directed that where there has been a disagreement between the Ombudsman and the Board on purely medical grounds and where the Select Committee supports the Ombudsman's position and recommendation, that the Board appoint a three physician "ad hoc Board of referees" to consider the medical evidence in the particular case. The Minister contemplated that The Workmen's Compensation Board would appoint one member of the Board of referees, one would be independently chosen by the complainant involved, and the Chairman would be chosen by the Ontario Medical Association from a list of specialists available from the particular medical or surgical field that is relevant in the circumstances.

Further the Minister directed the Board that in all of the cases wherein the Board is unwilling to comply with the Committee's recommendations, including disputes involving medical evidence, the matter:

"should be discussed with the Minister of Labour for his consideration, and for consideration of any other or further review prior to final determination of the matter being made by the Board."

By this procedure the Committee understands that the Minister intends that after the Committee in any subsequent report, supports an

Ombudsman recommendation and recommends its implementation by The Workmen's Compensation Board, this review and consultative procedure would be invoked before the Board submits a reply to the Committee's recommendation and before the matter is debated in the Legislature. It is the Minister's hope that this procedure would reduce significantly the number of recommendations addressed to The Workmen's Compensation Board which are debated in the Legislature.

The Committee welcomes the Minister's suggestions and commends him for the spirit in which they were made.

The Ombudsman and some members of the Committee have expressed reservations as to the impact of this procedure on the roles of the Ombudsman and of the Committee. The Committee welcomes the assurances of the Minister of Labour that the process is not intended nor would it in fact do anything to interfere with the authority of the Ombudsman as provided by The Ombudsman Act and this Select Committee as provided by its order of reference.

However, the Committee cannot accept the intervention of an ad hoc Board after the Ombudsman, this Committee and even The Workmen's Compensation Board have fully considered the issues, formed conclusions in respect thereto and where appropriate made recommendations. Such a procedure while not so intending, does in fact usurp the role of all three in the context of the Ombudsman process. In simple terms, it is too late in the process.

At the stage wherein the Minister intends to introduce this procedure the Ombudsman will have completed the investigation and reporting

requirements under The Ombudsman Act. The Committee will have fully considered the issues surrounding the Ombudsman's report and recommendations, The Workmen's Compensation Board's response thereto and will have recommended support for the Ombudsman's position to the Legislature. The Workmen's Compensation Board will have considered the relevant issues two and possibly three times and can most certainly be presumed to have a complete knowledge and understanding of those issues. Its only actions at that time should be directed to the implementation of the Committee's recommendations which are approved and adopted by the Legislature.

Any use of such a Board after all that has been done has the potential for undermining the Ombudsman's authority to investigate and report; the Committee's authority to consider the issues and report thereon to the Legislature; and The Workmen's Compensation Board's authority to formulate decisions based upon its various policies of adjudication, most particularly the policy of benefit of the doubt and its authority to rehear pursuant to Section 75 of The Workmen's Compensation Act. It also could be taken to contradict the statement of the Chairman of the Board that hereinafter all recommendations of the Committee adopted by the House, will be implemented by the Board.

However, the concept of an ad hoc Board of referees as proposed by the Minister does have considerable merit and may be effective if it is introduced at a relatively early stage of the Ombudsman process. It could be used for example to assist the Board in its response to the Ombudsman's notice of intention to investigate (19(1) letter) or in its response to the Ombudsman's notice of possible conclusions and recommendations made pursuant to Section 19(3).

The Committee understands that the Ombudsman and the Minister of Labour will discuss such a procedure to be utilized at such a relatively early stage in the Ombudsman's process. The Committee looks forward to hearing from both the Minister and the Ombudsman as to the progress of these discussions. Naturally the Committee welcomes any procedure which might be implemented which would serve to lighten the load of the Ombudsman and thereby this Committee.

As referred to above, the Chairman of The Workmen's Compensation Board when he appeared before the Committee advised that with respect to the recommendations in its Sixth Report which have been received and adopted by the Legislative Assembly, the Board is prepared to comply with the wishes of the Assembly and to implement the recommendations. The Chairman confirmed that the Board's position applied as well to the two recommendations of the Committee which previously had been rejected by the Board subsequent to the Order of the Legislature. The Chairman assured the Committee that the Board would not now or in the future go against the wishes of the Legislature of Ontario adopting any reports of this Committee which contained recommendations directed to The Workmen's Compensation Board.

The Committee wishes to commend the Chairman and other members of The Workmen's Compensation Board for their decision in this matter. It is hoped that the respect for the Legislative Assembly as evidenced by the Board's position will be a model for other governmental organizations.



## PART II

### NORTH PICKERING

This Committee has, since July, 1976, continuously played an active part to assist in the earliest resolution of all outstanding matters raised by the Ombudsman in his

"Report of the opinion of the Ombudsman, his reasons therefor and recommendations concerning the North Pickering project."

dated the 22nd of June, 1976. To that end, in its first report to the Legislature dated October 15, 1976, the Committee recommended that:

"The Legislative Assembly approve in every respect the agreement reached between the Ombudsman and the Minister of Housing. This Committee further recommends that the commission to be appointed under the Public Inquiries Act, 1971, be appointed forthwith with terms of reference substantially in accord with the agreement between the Minister of Housing and the Ombudsman."

At that time it was the Committee's opinion and expectation that the avenues of inquiry intended by the agreement (Agreement) between the Ombudsman and the Minister of Housing dated October 1, 1976 (See Schedule "D"), would fully investigate, examine and thoroughly report upon, with minimum of delay, the following statement of issues adopted by the Committee on August 22, 1976:

"Re: Former Landowners within North Pickering Project

- (i) Should the 44 former landowners within the North Pickering Project, referred to on pages 90 and 91 of the Ombudsman's Report, be entitled to have each of their cases assessed by the Land Compensation Board for a determination as to what losses, if any, they each have incurred as a result of the sale of their respective properties prior to February 4, 1974 by relying to their detriment, on any or all of inadequate appraisals, misleading statements made by agents of the Ministry of Housing or a misunderstanding of statements made by agents of the Ministry of Housing.
- (ii) Is the procedure available under Section 30(a) of the Expropriations Act, applicable to a reference to the Land Compensation Board of the matters contained in (i) above.
- (iii) Should the Land Compensation Board or some other suitable forum have the jurisdiction with respect to the 44 landowners and any other former landowners to determine the issue of whether the individual landowners were misled and accordingly acted to their detriment, by any or all of inadequate appraisals prepared by agents of the Ministry of Housing; misrepresentations made by agents of the Ministry of Housing; or a misunderstanding of the representations made by agents of the Ministry of Housing.

THE OMBUDSMAN'S REPORT REFERENCES PROCEDURES  
EMPLOYED BY MINISTRY OF HOUSING  
REPRESENTATIVES IN THEIR DEALINGS WITH  
FORMER LANDOWNERS WHICH RAISES QUESTIONS OF  
GENERAL APPLICATION TO LAND ACQUISITION PROCEDURE

- (i) Is land acquisition by negotiation by a Ministry of the Provincial Government, a suitable procedure where the magnitude of the project and area of the land in question is comparable to that of the North Pickering Project.
- (ii) Should there be a minimum standard for appraisals and appraisal procedure required of Ministries of the Provincial Government in all forms of land acquisitions.

- (iii) Should there be a code of procedure and conduct adopted for land negotiators and acquisition agents who are employed by Ministries of Government for the purpose of carrying out all forms of land acquisitions.
- (iv) Should the same Minister of the Crown be required, in the future, to continue to be responsible for a specific project of comparable magnitude to North Pickering, until the project has been completed.
- (v) Should there be minimum standards of planning of a project comparable to that of North Pickering required of a Ministry of the Provincial Government before any public disclosure is made and before any actions are undertaken to acquire the lands within."

The Government and the Ombudsman acted promptly to implement the provisions of the Agreement which called for the appointment of a Commission of Inquiry and for hearings pursuant to Section 20 of The Ombudsman Act. However, not long after the Commission and the Ombudsman hearings got under way a number of events occurred which have, in the Committee's opinion, deflected the true nature, intent and purpose of the Agreement.

The Committee and the Ombudsman have both recognized this and have made comment from time to time. The Ombudsman made his concern known to the Assembly and the Committee in his First and Second Reports dated January 10, 1977 and July 14, 1977 respectively. The Committee addressed its concerns to the Legislature in its Second Report dated March 28, 1977 and thereby offered a solution to the difficulties which at the time plagued the Royal Commission of Inquiry. The Committee recommended (the Honourable Larry Grossman, Q.C., dissenting) that:

"The Legislative Assembly request that the Order-In-Council again be amended to remove any ambiguity as to the meaning of 'adversarial nature' and so as to give effect to the agreement reached on October 1, 1976, as intended by this Committee, by removing the sentence 'All matters referred to this Commission shall be heard and determined in proceedings of an adversarial nature.' from Order-In-Council, O.C. 2959/76."

No one, since that recommendation was made, has responded on behalf of the Government.

In its Third Report to the Legislature dated November 25, 1977, the Committee recommended that:

"the government cause the Commission's Report to be submitted forthwith and that immediately thereafter a Commission of Inquiry or other suitable forum be appointed with terms of reference identical to the agreement between the Minister of Housing and the Ombudsman dated October 1, 1976, such Order-In-Council to append as schedules thereto the said agreement and the transcript of the Select Committee's proceedings dated October 1, 1976. Further, the Order-In-Council to provide that the Commission or forum actively inquire into the issues relevant to the former landowners and the property acquisition agents, that the Commission or forum retain its own counsel to assist it in the investigation, preparation and presentation to it of all relevant evidence. With respect to the phrase 'adversarial nature', it should be given the identical context in the Order-In-Council as it is given in the agreement of October 1, 1976 as interpreted by the Court of Appeal in its judgment released April 1, 1977."

No one, since that recommendation was made, has responded on behalf of the Government.

Since its Third Report a number of events have occurred which have caused this Committee deep concern. This is a report of those events, the consequences flowing therefrom as perceived by this Committee, and the



Committee's recommendations for a resolution of all outstanding matters with a minimum of further delay and expense.

In its Third Report to the Legislature, the Committee stated that:

"In the Committee's opinion, the Commission cannot submit a substantive report on all of the issues contained in and referenced by the said Order-In-Council, the agreement dated October 1, 1976 and by all parties who were either privy to, endorsed or concurred in that agreement. Any report submitted by the Commission will be of little or no assistance to the Government or the Legislature for any purpose related to the matters affecting the former landowners and the property acquisition agents. Such a report would also be capable of attack by persons affected of the type and substance as launched by counsel on behalf of the five land acquisition agents in respect of the Ombudsman's 'North Pickering' Report; that is, an action commenced in the Divisional Court of the Supreme Court of Ontario for a declaration that the Commission's report is null and void and of no legal force and effect. There has not been an inquiry as intended or expected by all those involved, of the relevant issues.

The Committee is of the opinion that all those who were either privy to, endorsed or concurred with the agreement dated October 1, 1976 have a duty to themselves, the Government, the Legislature and the people of the Province of Ontario to see the the issues contained in and referenced by the said Order-In-Council and as contained in the agreement dated October 1, 1976 are fully examined and thoroughly reported upon. If the Commission of Inquiry, as presently constituted, has terminated its proceedings thus falling short of its purpose as intended by all those involved, and as they have publicly confirmed from time to time, then a new Commission or other forum should be appointed forthwith with powers and responsibilities expressed in unambiguous language. The Order-In-Council, to avoid any further misunderstanding, any further delay, any further involvement by the courts, and any loss of public confidence, should have annexed thereto the agreement dated October 1, 1976 and the transcript of this Committee's proceedings dated October 1, 1976."

Subsequent to the Committee's recommendation, on the 5th of December, 1977, The Royal Commission of Inquiry submitted its report. The Attorney General tabled the report in the Legislature on March 10, 1978.

Dealing with the matter of the merits of the landowners' claims for additional compensation the Commission at page 131 of its report stated:

"The first matter referred to the Commission was the overall merits of claims for additional compensation by some of the former landowners. The only evidence presented on this issue consisted of a number of exhibits, including the file of the Ministry on the Mrs. Heather Dinsmore transaction, and some evidence in chief by Mrs. Dinsmore, who dealt with her complaints about the appraiser. She also gave evidence as to the visits by Mr. Bowles, an acquisition agent about whom she complained. The file contains an affidavit by him denying some of the statements about which she complained. From statements by her counsel, it would appear that it had been intended to lead much more evidence on her behalf. While the above evidence was led when the Commission was differently constituted and not repeated before the present Commission, it is not improper to comment that the facts of her claim were not sufficiently canvassed to enable a tribunal to make a determination of its merits. As Mrs. Dinsmore and the other claimants withdrew from the proceedings, the Commission is unable to consider, recommend and report on the overall merits of the claims for additional compensation by the former landowners."

The concerns expressed by the Committee in its previous reports and most particularly in its Third Report as quoted above, have been proven by the Royal Commission to have been well-founded. In the Committee's opinion implementation of Recommendation #1 in its Third Report (Page 13 supra), at the time it was made, was the only effective way in which the issues touching the former landowners could be thoroughly investigated and reported upon and in which all outstanding issues surrounding the "North Pickering Report" could have been appropriately resolved.

Since the publication of the Royal Commission's report, counsel for the five land acquisition agents named in the agreement between the Ombudsman and the Minister of Housing, have written on May 4, 1978, to the Attorney General and the Minister of Housing advising that his clients, by reason of certain statements made by the Ombudsman respecting the Royal Commission's report and the conduct of the inquiry conducted on the Ombudsman's behalf by Mr. Keith Hoilett, felt compelled to withdraw from those hearings. The land acquisition agents were concerned that the Ombudsman hearings would be used to vindicate the original allegations made by the Ombudsman against them in his report which allegations the Royal Commission has found not to be justified.

By reason of his clients' views of the Ombudsman hearings and the Ombudsman's comments respecting the Royal Commission report, counsel for the five land acquisition agents sought the appointment of a new Commission of Inquiry under the Public Inquiries Act to investigate the claims of the former landowners whose claims were being heard and reported upon by Mr. Hoilett.

The Ombudsman, by letter dated April 13, 1978 to the Minister of Housing, advised that he proposed to refer to the Supreme Court of Ontario the question of his jurisdiction to comply with a request made by counsel for the former landowners whose cases were heard before the Commission of Inquiry, that the Ombudsman further investigate those complaints and report appropriately to the Legislative Assembly.

On the 26th day of September, 1978, an application was launched in the Supreme Court of Ontario on the Ombudsman's behalf for an Order declaring

the jurisdiction of the Ombudsman to re-investigate these former landowners' complaints and for an Order declaring whether any re-investigation on the part of the Ombudsman would breach or otherwise affect the agreement between the Ombudsman and the Minister of Housing dated October 1, 1976. The Committee understands that the final arguments in this application will be heard by the Chief Justice of the High Court of the Supreme Court of Ontario sometime in September, 1979.

On June 23, 1978, the Minister of Housing wrote to the Ombudsman (See Schedule "E") advising that, having regard to the conduct of those participating in the implementation of the Agreement, the Ministry would no longer be bound by the provisions of that agreement in that the findings of the Ombudsman arising out of the "Hoilett Hearings" would no longer be accepted without question. The Minister indicated that the Ministry will receive and treat the report presented by the Ombudsman on the Hoilett Hearings as any other Ombudsman's report. That is, the Minister of Housing would not be bound by agreement or otherwise, to implement all or any portions of any recommendations which may be contained in the report.

The Committee understands that all matters associated with the "Hoilett Hearings" will not be completed before the 12th of October, 1979. Counsel for the parties appearing before Mr. Hoilett are still in some process of preparation of written and oral argument.

In the result, the Committee is of the opinion that Mr. Hoilett will not have his report ready for submission to the Ministry of Housing, however it is to be treated by that Ministry, before the summer of 1980. In addition, if Mr. Hoilett's report is not treated as a final report of the Ombudsman pursuant



to Section 22(3) of the Act, then it may be that provisions of The Ombudsman Act under Section 19(3) may be necessary before a "final" report may be submitted. All this will serve to further delay the ultimate disposition of this matter.

Therefore, regardless of the position taken by the Ministry of Housing and others with respect to the original Agreement, the Ombudsman will not be in a position to complete his obligations under it before the latter part of 1980. That notwithstanding, and in any event, the events which have occurred in the last three years and the positions taken by many of the parties concerned force the Committee to conclude - North Pickering is back to the same position it was when it first came to the Committee in July, 1976 - nothing has happened which can cause anyone to expect that North Pickering will be resolved, by any means, in the foreseeable future.

The Ombudsman is still contending for the solution as contained in his original report. The Ministry of Housing refuses to be bound by the Ombudsman's recommendations. The five land acquisition agents want a Royal Commission of Inquiry where they will have an opportunity to refute the allegations made against them by the Ombudsman in his original report. The former landowners affected are still seeking relief without any assurance from anyone that it will be forthcoming, where deserved. A Royal Commission of Inquiry did little if anything to assist in the resolution of the matters outstanding. The Ombudsman has held hearings under Mr. Hoilett's direction for almost two years at an enormous cost to the people of the Province of Ontario. The Ombudsman will submit a report to the Ministry of Housing which the Ministry considers not to be binding upon it in any way.

More recently and with the encouragement of this Committee the Ombudsman, the Minister of Housing, and counsel representing all former landowners have engaged in some discussions with a view to seeking a resolution of all outstanding matters on terms that are the most amicable and appropriate in the circumstances. The Committee understands that those discussions have not resulted in any "settlement" of all outstanding issues.

It is tragic to report that all of the public money spent since October 1, 1976 to implement the original agreement between the Ombudsman and the Minister of Housing, including the time and effort expended by those participating in the Royal Commission and in the Hoilett hearings, will be totally wasted unless all of those affected thereby commit themselves to achieving an appropriate solution for all in the quickest period of time. It is taking much too long to implement the original agreement.

In the Committee's opinion, there must be some individual claims of former landowners where agreement for settlement can be reached with the Ministry of Housing prior to and without the need for Mr. Hoilett's report. The Committee urges the Ministry of Housing, the Ombudsman and representatives of those former landowners to enter into discussions immediately after October 12, 1979 for the purpose of identifying any claims wherein agreement for settlement can be reached. In the event such claims are identified, the Committee urges those concerned to implement those settlements as quickly as possible.

The Committee understands that the Ombudsman has given Mr. Hoilett a deadline of Christmas, 1979 in which to finalize his report.

Mr. Hoilett should be held to that deadline. If the report is completed by that date, it will keep North Pickering current in the minds of those who must work towards a final settlement.

Before Mr. Hoilett's report is completed, however, the Ombudsman and those who participated in the Hoilett hearings must clarify the matter of the publication of the report. It seems the Ministry of Housing was always of the view that the report of Mr. Hoilett would be made available to them. The Ombudsman on the other hand is less certain that the report was ever intended to be published. This issue has the potential of totally undermining any efforts towards settlement. The Committee urges the Ombudsman to make use of Mr. Hoilett's report in a way which is most conducive to and of greatest assistance towards the most appropriate resolution of North Pickering in the shortest period of time.

### PART III

#### SIXTH REPORT OF THE OMBUDSMAN OCTOBER 1, 1978 - MARCH 31, 1979

##### (A) STATISTICAL SUMMARY

The Committee is pleased to report that the disposition of complaints by the Ombudsman's office during the sixth reporting period makes it clear that the Ombudsman and his office are making meaningful progress towards the vexing problems of the duration taken to complete complaints, the number of non-jurisdictional cases being dealt with as compared to jurisdictional cases and the average duration spent on matters outside the Ombudsman's jurisdiction. The Committee senses a real commitment by all members of the Ombudsman's office to bring these matters within manageable proportions in order that those complaints received by the office properly within the jurisdiction of the Ombudsman may be given the most effective treatment within a reasonable duration having regard to the circumstances of the complaint.

The Committee commends the Ombudsman and his office for these efforts and looks forward to seeing further progress during the period referenced by the Ombudsman's next report.

##### (B) FUTURE REPORTS OF THE OMBUDSMAN

The Ombudsman has advised that hereafter he will report to the Legislature on an annual basis, the first such report scheduled for the close of the reporting period, March 31, 1980. He does as well intend to issue "Interim



Reports" during the course of the reporting year which will contain special matters considered by him necessary to report quickly to the Legislature and matters wherein governmental organizations have denied recommendations made by him in a report pursuant to Section 22(3) of the Act.

The Committee welcomes the Ombudsman's decision to report annually. It will avoid much duplication of effort and subject matter. It will also permit a more meaningful examination of certain trends of the office as may be disclosed by an examination of the statistical summaries.

The Committee also welcomes the Ombudsman's intention to table as deemed necessary, interim reports from time to time. The Ombudsman intends as does this Committee, that those interim reports will be considered by this Committee as soon as practicable after they are tabled in the Legislature. This may necessitate from time to time, that the Committee sits concurrently with the Legislature. To the extent that this becomes necessary the Committee recommends that ITS ORDER OF REFERENCE BE AMENDED TO INCLUDE A PROVISION WHEREBY IT IS PERMITTED TO SIT CONCURRENTLY WITH THE LEGISLATURE TO CONSIDER FROM TIME TO TIME, INTERIM REPORTS TABLED BY THE OMBUDSMAN IN THE LEGISLATURE<sup>(1)</sup>.

(C) REGIONAL OFFICES

The Ombudsman opened his first regional office in Thunder Bay on June 15, 1979. It is notable that the office has been accomplished without adding to the numbers of the Ombudsman's staff. It is hoped by the Ombudsman that a substantial portion of the cost of the office may be underwritten by a

saving in travel and other related expenses of investigating complaints in the northwestern regions of Ontario.

The Committee wishes to compliment the Ombudsman on this step and supports him totally in the concept of creating regional offices throughout the province. It will foster a sense of community between the Office of the Ombudsman and the various regions in which offices are placed. The inherent cost saving involved is a welcome by-product of the Ombudsman's approach.

(D) THE CORRECTIONAL REPORT

The Ombudsman, on July 17, 1979, received from the Minister of Correctional Services the Ministry's response to the Correctional Report. The Ombudsman is now considering the response before preparing and submitting his final report on this matter to the Legislature. At such time as the Ombudsman's final report is received the Committee will consider the matter as may be appropriate and necessary in the circumstances.

(E) APPLICATIONS PURSUANT TO SECTION 15 OF THE OMBUDSMAN ACT TO DETERMINE THE OMBUDSMAN'S JURISDICTION

(1) Health Disciplines Act

The Court of Appeal which heard this matter on the 7th and 8th of June, 1979 released its decision on the 31st of July, 1979 wherein it dismissed the appeals of the Health Disciplines Board and the Attorney General of Ontario from the Order of Mr. Justice Labrosse dated the 14th day of December, 1978 in which His Lordship decided that the Health Disciplines Board was a governmental organization of the Province of Ontario within the meaning of The Ombudsman Act, 1975 and that the Ombudsman does have jurisdiction pursuant

to Section 15(1) of The Ombudsman Act to investigate or review any decision made by the Health Disciplines Board of Ontario in respect of the case which was in issue on the particular application.

The timing of the release of the decision has not permitted the Committee to discuss its effect with the Ombudsman, the Attorney General and representatives of the Health Disciplines Board. Nor is it known at the writing of this Report whether the Attorney General or the Health Disciplines Board intend to apply for Leave to Appeal the decision to the Supreme Court of Ontario. In any event, the Committee intends at its next hearings to discuss the specific and general effects of this decision with the parties named above.

Some of the Committee members in discussions with the Attorney General expressed concern with respect to the position adopted by the Attorney General on the original application and on the appeal. That position was perceived by some to be both adversarial and adverse to the interests of the Ombudsman on the application and on the appeal.

Some members of the Committee are concerned that the role adopted by the Attorney General is consistent with an approach of limiting the role of the Ombudsman vis-a-vis boards, agencies and other administrative units of the Crown.

The Attorney General advised the Committee that in respect of the jurisdiction of the Ombudsman the Attorney General's role is to interpret the legislation on behalf of the Government and to take all necessary and appropriate steps to persuade the courts of the merits of that interpretation.

This Committee does not take issue with the role perceived by the Attorney General for his ministry in respect of interpretation and advice to government and its ministries on matters of legislation. However, to the Committee, this role does not seem to be appropriate when examined in the context of the parties to the original application as launched by the Ombudsman. The application was brought by the Ombudsman to determine jurisdiction over the Health Disciplines Board. The Health Disciplines Board responded to the application taking the position that it was in every respect independent of the government and accordingly not coming within the definition of a governmental organization under The Ombudsman Act. In effect, it was saying it was "a private citizen".

The Attorney General was represented by counsel on the original application and submissions were made on his behalf to Mr. Justice Labrosse consistent with and totally supportive of the Health Disciplines Board. On appeal, the Attorney General's representative not only took a position consistent with and supportive of the position of the Health Disciplines Board but made submissions in the original Statement of Fact and Law filed which were adopted and relied upon by the Health Disciplines Board on the appeal. In other words, the Attorney General by virtue of the submissions made on his behalf and as adopted and relied upon by the Health Disciplines Board became, in effect, the counsel and adversary for the Health Disciplines Board in opposition to the Ombudsman.

In the Committee's opinion this is not a function which the Minister of the Attorney General should adopt vis-a-vis matters involving the Ombudsman's jurisdiction. Nor should the Attorney General on any such



application adopt a position wherein he is in effect the counsel for and totally supportive of the position of the Ombudsman adverse to a position adopted by a "governmental organization of the Province of Ontario".

Rather, the Committee sees the Attorney General's function on these applications as more properly one of an "amicus curiae". The Attorney General should have every ability to assist the court on matters of law and fact on these applications. That is, he should assist the court to come to the appropriate decision in the circumstances. He should not, however, take an active part in the adversarial process before the court. That should be left to the parties on the application, the Ombudsman and the governmental organization in question.

The Committee makes these comments notwithstanding that the Court of Appeal rejected all of the submission made on behalf of the Attorney General with respect to the specific question of the Ombudsman's jurisdiction over the Health Disciplines Board and the more general question of the breadth of the definition of governmental organization under the Act. Perhaps now that the Court of Appeal has rendered a decision which is capable of such a broad scope, the Attorney General will see no further need to participate on these applications in the future.

(2) North Pickering Re-Investigation

The Committee has commented on this matter in Part II above.

(3) Workmen's Compensation Board  
- Policy of Benefit of Reasonable Doubt

In its Fifth Report, the Committee reviewed and discussed the ambiguities inherent in the different policies referable to reasonable doubt that

existed within The Workmen's Compensation Board at that time. Since then and in discussions with the Committee in February, The Workmen's Compensation Board approved on the 15th of December, 1978 a new policy of Benefit of Reasonable Doubt. While the Committee considered this policy to be an improvement over previous ones there were continuing problems of interpretation and application of the policy foreseen by the Committee and the Ombudsman.

Additionally, the Ombudsman in his Sixth Report (pages 10 to 13) provided certain comments and concerns he had respecting interpretation and application of the policy.

The Vice-Chairman of Appeals of The Workmen's Compensation Board provided the Committee with a new draft of the Policy of Benefit of Doubt which is intended to be discussed with the Corporate Board in the near future. This policy states that:

"The 'Benefit of Doubt' principle is applied to all levels of decision-making at the Board.

The Board interprets the principle as meaning that it is not necessary to adduce conclusive proof in support of a claim for compensation. The Board, when adjudicating a claim, will draw from all the circumstances of the case, including the evidence adduced and the medical opinions, all reasonable inferences and presumptions in favour of recognizing entitlement.

When applied to an injured employee, the effect is that the employee does not require a preponderance of evidence in support of his claim. On the other hand, mere possibilities will not suffice."

The Committee is pleased that the Board does not intend to apply this policy only at the end of an appeal after all evidence is heard. Rather the

Board intends that the policy may be applied in respect of any issue of fact which is presented on the appeal and which is necessary for the Board to make a finding. However, the Committee and the Ombudsman both expressed continuing reservations respecting the interpretation and application of this policy. Particularly in the area of determination by the Board of whether an issue of fact is to be categorized as a probability or a "mere possibility". The Workmen's Compensation Board before referring the matter to the Corporate Board for decision will be reviewing the latest policy against the background of the comments of the members of the Committee and the Ombudsman and it will make further amendments as considered necessary and appropriate.

However, the Committee wishes The Workmen's Compensation Board to incorporate as part of the policy for discussion with the Board an amendment to the last paragraph as suggested by a member of the Ombudsman's staff. Accordingly, the Committee recommends that the last paragraph of the policy of benefit of the doubt of The Workmen's Compensation Board be deleted and the following substituted therefor:

"WHEN APPLIED TO AN INJURED EMPLOYEE, THE EFFECT IS THAT THE EMPLOYEE DOES NOT REQUIRE A PREPONDERANCE OF EVIDENCE IN SUPPORT OF HIS CLAIM. RATHER, WHERE THERE IS DOUBT ON ANY ISSUE, AND THE DISPUTED POSSIBILITIES ARE APPROXIMATELY EQUAL IN WEIGHT, THEN THE ISSUE WILL BE RESOLVED IN FAVOUR OF THE EMPLOYEE. ON THE OTHER HAND, SPECULATION WILL NOT SUFFICE." (2)

(F) RULES FOR THE GUIDANCE OF THE OMBUDSMAN IN THE EXERCISE OF HIS FUNCTIONS UNDER THE OMBUDSMAN ACT

In its Fifth Report, the Committee (pages 83 to 91) described eight areas which require immediate formulation of general rules for the guidance of

the Ombudsman in the exercise of his functions under The Ombudsman Act. Since that time the Committee has discussed these areas with the Ombudsman and various members of his staff.

The Committee is pleased to report that without exception the Ombudsman's office is presently complying with matters hereinafter set forth in this part. Some members of the Ombudsman's staff have suggested to the Committee that inasmuch as the office is by its actions complying with these matters, then general rules are not necessary. In the Committee's opinion general rules do not become meaningless or unnecessary simply because the present office procedure and practice complies therewith.

The Committee is concerned that there be clear and consistent guiding principles in the form of general rules to which all ombudsmen and their staff hereafter may look to for direction. There does not appear to be any organized procedure within the Ombudsman's office to make new members aware of the substantive requirements of The Ombudsman Act. Nor does it appear that these requirements previously discussed with the Ombudsman's office have been incorporated into the Ombudsman's "Office Manual" to which all members of his staff may refer for advice and guidance.

The implementation of these rules has caused the Committee some concern. Section 16(1) of The Ombudsman Act provides that:

"The Assembly may make general rules for the guidance of the Ombudsman in the exercise of his functions under this Act."



Subsection 2 provides:

"All rules made under this section shall be deemed to be regulations within the meaning of the Regulations Act."

Therefore, upon the act of the Assembly making general rules they are deemed to be regulations under The Ombudsman Act.

The Committee's order of reference provides that:

"pursuant to Section 16(1) of The Ombudsman Act, 1975, formulate from time to time general rules for the guidance of the Ombudsman in the exercise of his functions under The Ombudsman Act."

It would appear therefore that the Assembly has pursuant to the Committee's order of reference transferred the authority to the Committee to formulate the general rules. Therefore, once the Committee has formulated same and so reported thereon to the Legislature in one of its reports, and once having been approved and adopted by the Legislature, they thereafter are "deemed to be regulations within the meaning of the Regulations Act." as Section 16(2) provides.

Therefore, with that understanding of the required procedure, the Committee hereby recommends for approval and adoption by the Legislature the following general rules for the guidance of the Ombudsman in the exercise of his functions under The Ombudsman Act:

(1) Annual Report

THE OMBUDSMAN SHALL, NO LATER THAN THREE MONTHS AFTER THE END OF HIS REPORTING PERIOD, TABLE HIS ANNUAL OR

SEMI-ANNUAL REPORT, AS THE CASE MAY BE, WITH THE SPEAKER OF THE LEGISLATIVE ASSEMBLY.<sup>(3)</sup>

(2) Confidentiality

(i) THE OMBUDSMAN AND HIS STAFF SHALL NOT, EXCEPT WHERE PERMITTED BY THE OMBUDSMAN ACT IN CARRYING OUT FUNCTIONS THEREUNDER, DISCLOSE TO ANY THIRD PARTY ANY INFORMATION RECEIVED BY HIM OR HIS STAFF WHILE CARRYING OUT ANY OF THE FUNCTIONS OF THE OMBUDSMAN UNDER THE OMBUDSMAN ACT.

(ii) A MEMBER OF THE OMBUDSMAN'S STAFF CARRYING OUT OMBUDSMAN FUNCTIONS UNDER THE OMBUDSMAN ACT, SHALL NOT EXPRESS TO ANYONE, OTHER THAN TO THE OMBUDSMAN OR TO HIS AUTHORIZED DELEGATE, HIS OR HER OPINION, RECOMMENDATION OR OTHER SIMILAR COMMENTS RESPECTING THE DECISION, RECOMMENDATION, ACT OR OMISSION PURPORTED TO HAVE BEEN COMMITTED BY OR ON BEHALF OF THE GOVERNMENTAL ORGANIZATION IN QUESTION OR RESPECTING ANYTHING ELSE ARISING OUT OF THE INVESTIGATION OF THE COMPLAINT BY THE OMBUDSMAN AND HIS STAFF.<sup>(4)</sup>

(3) Preliminary Investigations

PRELIMINARY INVESTIGATIONS BY THE OMBUDSMAN'S OFFICE SHALL BE LIMITED TO CASES WHEREIN FURTHER INFORMATION IS REQUIRED BY THE OMBUDSMAN OR ANY MEMBER OF HIS STAFF EITHER TO CONFIRM A COMPLAINT OR WHEREIN IMMEDIATE ASSISTANCE OF A COMPLAINANT IS REQUIRED AND THE CIRCUMSTANCES OF THE COMPLAINT MAKE THE IMMEDIATE IMPLEMENTATION OF THE

PROCEDURAL REQUIREMENTS OF THE OMBUDSMAN ACT IMPOSSIBLE. ONCE THE SUBSTANCE OF THE COMPLAINT HAS BEEN CONFIRMED BY THE OMBUDSMAN OR HIS STAFF OR WHERE THE IMMEDIATE DISPOSITION OF THE COMPLAINT IS NEITHER POSSIBLE NOR ADVISABLE, THE REQUIREMENTS OF THE OMBUDSMAN ACT MUST BE FOLLOWED.<sup>(5)</sup>

(4) Notice to Governmental Organizations or Persons Pursuant to Section 19(3) of The Ombudsman Act

The Ombudsman has correctly pointed out to the Committee that the rule it was intending in its Fifth Report (page 89) was on the one hand capable of an overly wide interpretation and on the other hand an unduly narrow one. The Committee and the Ombudsman both share a firm conviction that this section needs to be substantially reworded by amendment. However, in the interim and to afford all persons affected by this very important section clarity and direction, the Committee believes that a general rule is necessary. If the legislative amendment whenever it occurs, renders the rule unnecessary then it can either be revoked or appropriately amended.

The root of the difficulties with respect to the interpretation and application of this section centres around the phrases "adversely affect" and "adverse report".

The Committee is of the opinion that the phrase "adversely affect" as it is contained in Section 19(3) must be read with Section 22 of The Ombudsman Act. In the Committee's opinion if during the course of an investigation it appears to the Ombudsman that he may have sufficient grounds for either formulating one or more opinions under Sections 22(1) and 22(2) of The Ombudsman Act or a recommendation under Section 22(3) of The Ombudsman

Act, then he shall give the governmental organization or person in question an opportunity to make representations respecting the adverse report or recommendation. "Adverse report" in the context of Section 19(3) merely refers to the report under Section 22 that the Ombudsman may have sufficient grounds to make. The report which the Ombudsman may have sufficient grounds for making or the recommendation which the Ombudsman may have sufficient grounds for making is adverse because it contains one or more opinions or recommendations under Section 22 and because its affect alters, opposes or causes the original decision, recommendation, act or omission to be changed in some way.

Other than the Annual Report, the Ombudsman only has jurisdiction to report respecting a decision, recommendation, act or omission by Section 22 and where necessary, Section 23.

The Committee agrees with the Ombudsman however, that the requirement of giving notice to any person who is identified or is capable of being identified and who may have made or contributed to the original decision, recommendation, act or omission is unduly wide. The Committee is mindful that the Ombudsman's office presently places a wide interpretation on the number of persons entitled to such a notice.

Therefore, the general rule that the Committee has formulated is as follows:

"WHERE AT ANY TIME DURING THE COURSE OF AN INVESTIGATION IT APPEARS TO THE OMBUDSMAN THAT THERE MAY BE SUFFICIENT GROUNDS FOR FORMULATING OPINIONS UNDER SECTION 22(1) AND (2) OF THE OMBUDSMAN ACT OR OF MAKING ANY RECOMMENDATIONS PURSUANT TO SECTION 22(3) OF THE OMBUDSMAN ACT, WHICH HAS THE EFFECT OF ALTERING, OPPOSING OR CAUSING THE ORIGINAL



DECISION, RECOMMENDATION, ACT OR OMISSION TO BE CHANGED IN ANY WAY, THE OMBUDSMAN SHALL GIVE THE GOVERNMENTAL ORGANIZATION AND ANY PERSON WHO IS IDENTIFIED OR IS CAPABLE OF BEING IDENTIFIED AS HAVING MADE OR COMMITTED OR CAUSED TO BE MADE OR COMMITTED, AS THE CASE MAY BE, THE DECISION, RECOMMENDATION, ACT OR OMISSION, AN OPPORTUNITY TO MAKE REPRESENTATIONS RESPECTING THE ADVERSE REPORT OR RECOMMENDATIONS EITHER PERSONALLY OR BY COUNSEL." (6)

(5) Opinions and Recommendations  
Pursuant to Section 22 of The Ombudsman Act

ALL REPORTS OF THE OMBUDSMAN MADE TO GOVERNMENTAL ORGANIZATIONS IN ACCORDANCE WITH SECTION 22 OF THE OMBUDSMAN ACT SHALL CONTAIN OPINIONS IN THE WORDING OF SECTION 22(1) AND RECOMMENDATIONS WITHIN THE WORDING OF SECTION 22(3).<sup>(7)</sup>

(6) Procedure of Ombudsman Where Response By Governmental Organization To A Recommendation In A Report Is Considered By The Ombudsman Not To Be Adequate And Appropriate

IN ALL CASES WHERE THE OMBUDSMAN HAS CONCLUDED THAT A RESPONSE BY A GOVERNMENTAL ORGANIZATION TO A REPORT MADE BY HIM PURSUANT TO SECTION 22(3) OF THE ACT IS NEITHER ADEQUATE NOR APPROPRIATE, AND WHERE HE WISHES ULTIMATELY, IF THE MATTER CANNOT BE RESOLVED, TO SEEK SUPPORT FOR HIS RECOMMENDATION IN THE LEGISLATURE, THE REPORT UNDER SECTION 22(3) SHALL BE REFERRED TO THE PREMIER BEFORE IT IS REFERRED TO THE LEGISLATURE.<sup>(8)</sup>

(7) General

The Committee in its Fifth Report had included two other areas requiring general rules, an exhaustive list of governmental organizations within the Ombudsman's jurisdiction and a rule respecting the Ombudsman's monitoring procedure.

With respect to the former, the Committee has deferred any finalization of this rule pending discussions with the Ombudsman and the Attorney General. Now that the decision of the Court of Appeal has been rendered in respect of the application affecting the Health Disciplines Board, the Committee intends to resume those discussions shortly and report to the Legislature on a formulation of a general rule in this area.

With respect to the monitoring procedure, the Ombudsman has advised the Committee that this procedure has been totally discontinued. The Ombudsman Act of Ontario contains no authority for this procedure. In the result the Committee does not consider that a general rule is necessary restricting or precluding an act which is not covered by the statute.

PART IV

RESPONSES FROM GOVERNMENTAL  
ORGANIZATIONS TO RECOMMENDATIONS  
MADE BY THE COMMITTEE IN ITS FIFTH REPORT

By the nature of the Committee's Sixth Report, responses made by governmental organizations to recommendations contained in the Committee's Fifth Report were not included. This part deals with those responses as received by the Committee prior to May, 1979.

The following part of this Report which deals with two charts prepared by the Ombudsman respecting recommendations and/or cases which required further action from governmental organizations will in some measure, overlap this part. It is intended that the Committee will combine these two parts in subsequent reports.

The following table summarizes certain governmental organizations' responses to relevant recommendations made by the Committee in its Fifth Report to the Legislature and the Committee's opinion respecting those responses. Following each of the tables and under the heading of the various governmental organizations, the Committee, where necessary, has commented in more detail.

(A) TABLE OF GOVERNMENTAL ORGANIZATIONS WHICH HAVE  
MADE SATISFACTORY RESPONSES TO RECOMMENDATIONS  
MADE BY THE COMMITTEE IN ITS FIFTH REPORT

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(a) MINISTRY OF THE ATTORNEY GENERAL

Recommendation No. 41

The Ombudsman's office, the Ministry of the Attorney General, and this Committee confer forthwith to prepare and settle upon a list of governmental organizations under the jurisdiction of the Ombudsman.

Recommendation No. 42

Upon the creation of any new commission, board, administrative unit of the Government of Ontario or any agency thereof, the matter of its inclusion as part of the list be forthwith referred to this Committee for consideration and report to the Legislature.

(b) MINISTRY OF COMMUNITY AND SOCIAL SERVICES

Recommendation No. 24

The Minister of Community and Social Services cause Section 12(11) of The Family Benefits Act to be repealed and the following substituted therefor:

"The Board of Review may, on application of any party or on its own motion and with or without a hearing, reconsider and vary any decision made by it and if the Board hears from the parties to the proceedings in which the original decision was made, the provisions of this section, except subsection (4), apply mutatis mutandis to the proceedings on such reconsideration."

(c) MINISTRY OF CONSUMER AND COMMERCIAL RELATIONS

Recommendation No. 22

Where the Ombudsman, as a result of a complete investigation of a complaint, formulates the opinion that a decision of the Rent Review Board comes within one of the sub-headings of Section 22(1) of The Ombudsman Act and he recommends that the decision be altered, varied or amended in some way in accordance with Section 22(3) of The



Ombudsman Act, and where the only means available in law is an application for judicial review, the Rent Review Board, if it agrees with the Ombudsman's opinion and recommendation, should hereafter, to implement the recommendation, consent to the appropriate order in the Divisional Court which consent shall include all reasonable costs of the complainant on a solicitor and client basis.

Recommendation No. 23

The Ministry of Consumer and Commercial Relations cause an amendment to be made to Section 13(7) of The Residential Premises Review Act by removing therefrom the phrase "within thirty days after making an order".

(d) WORKMEN'S COMPENATION BOARD

Recommendation No. 1

The information circular or booklet as referenced by Recommendation #27 of the Committee in its Third Report be forwarded to all individuals against whom an adverse decision has been made, at the time they are notified by the Board of that decision.

Recommendation No. 2

For the purpose of distributing the information circular or booklet, the definition of adverse decision be expanded by the Board to include those decisions whereby the claimant obtained a result qualitatively and/or quantitatively less than was sought in the claim.

Recommendation No. 3

With respect to Recommendation #28 in the Committee's Third Report, concerning the future necessity of the Board's booklet "Claims Information for Employees + Employers", the Workmen's Compensation Board proceed with its revision of the document referred to in that recommendation and advise the Committee forthwith as soon as the revision has been completed.

Recommendation No. 4

The Workmen's Compensation Board file with this Committee the briefs which it will submit to the Commission on Freedom of Information and Individual Privacy and to the Commission of Inquiry into the Confidentiality of Health Records in the Province of Ontario, forthwith as they are presented to each of the Commissions.

Recommendation No. 5

The Workmen's Compensation Board review its present appeal process with a view to determining whether and to what extent it can be streamlined and made more efficient while serving the interests of all those affected thereby.

Recommendation No. 7

The Workmen's Compensation Board schedule a hearing as soon as possible respecting the complaint referred to in Recommendations #39 and #40 of the Committee's Third Report, and thereafter advise the Committee forthwith of the results of that hearing.

Recommendation No. 8

Hereafter, the Workmen's Compensation Board prepare and submit responses to recommendations contained in subsequent reports of this Committee, within a reasonable period of time immediately after the tabling of the Reports in question in the Legislature.

Recommendation No. 15

With respect to Complaint #75 in the Ombudsman's Third Report, the Workmen's Compensation Board take all appropriate actions in consequence of the medical referee's report forthwith upon receipt thereof and that thereafter the Board forthwith report any actions taken in consequence thereof to the office of the Ombudsman.

Recommendation No. 17

The Workmen's Compensation Board re-hear the matters contained in Complaint #77 of the Ombudsman's Third Report as quickly as possible and thereafter forthwith report its decision to the Ombudsman.

Recommendation No. 19

The Workmen's Compensation Board forthwith formulate a policy of benefit of the doubt or reasonable doubt which policy is to be applied at all levels of decision making within the Board, including the Appeal Board level.

Recommendation No. 20

When that policy of benefit of the doubt or reasonable doubt has been formulated and implemented, the Workmen's Compensation Board forthwith hold a hearing pursuant to Section 75 of The Workmen's Compensation Act in respect

of the claim for compensation set out in Complaint #76 of the Ombudsman's Third Report. The Appeal Board panel constituted for such a hearing should consider expressly whether the policy of benefit of the doubt or reasonable doubt is appropriate to be applied in this case. In the circumstances of a request made by the employer in this case, the Committee recommends that the employer be permitted to participate in the said hearing.

Recommendation No. 25

The Workmen's Compensation Board publish a list, for distribution to the public, of its policies, manuals and directives respecting the adjudication process within the Board at all levels. This list should describe the documentation in the same detail as contained in Schedule "H" hereto. That list shall also contain, for the information of the public, the Board's unit cost to supply the items.

Recommendation No. 26

The Workmen's Compensation Board make all or any portion, as the case may be, of its policies, manuals and directives relative to the adjudication process at all levels, available to the public at the Board's actual cost. Any amendments, alterations, deletions and additions respecting the items contained in those documents shall also be made available to the public on the same cost basis.

Recommendation No. 28

An Appeal Board panel of the Workmen's Compensation Board conduct a hearing forthwith for the purpose of determining whether with respect to the complainant described in Complaint #75 of the Ombudsman's Fourth Report, the 5% pension increase should, in the circumstances, be more appropriately commenced as at March, 1965.

Recommendation No. 29

The Workmen's Compensation Board implement the Ombudsman's recommendations made in Complaint #76 of his Fourth Report by granting the complainant entitlement to the sum necessary to purchase the commercial type heating lamp which has been previously requested.

Recommendation No. 30

Hereafter the office of the Ombudsman and the Workmen's Compensation Board exercise a more realistic approach in the resolution of matters involving a relatively minor amount of money.

Recommendation No. 32

The Workmen's Compensation Board upon receipt of that medical report conduct a hearing pursuant to Section 75 of The Workmen's Compensation Act and that the Appeal Board panel presiding at the hearing consider the application of the policy of benefit of the doubt to the circumstances of this case.

Recommendation No. 34

If by the time this report is tabled in the Legislature the Workmen's Compensation Board has reconsidered Complaint #77 pursuant to Section 75 of The Workmen's Compensation Act, the Board advise the Committee and the Ombudsman of that decision as soon as it is rendered.

Recommendation No. 36

In the event that the Ombudsman is able to form the opinion that the impairment of earning capacity is significantly greater than is usual for the nature and degree of injury, then he shall so report same to the Workmen's Compensation Board who shall, in that event, hold a hearing of the matter of Complaint #78 in the Ombudsman's Fourth Report, pursuant to Section 75 of The Workmen's Compensation Act.

Recommendation No. 38

The Workmen's Compensation Board hold a hearing pursuant to Section 75 of The Workmen's Compensation Act to reconsider the entitlement of the complainant referenced in Complaint #80 of the Ombudsman's Fourth Report, to benefits under the old Section 42(5) of The Workmen's Compensation Act. At that hearing, the Board is to specifically consider the factors of the complainant's age at the time of the injury and his ability, for whatever reason, to obtain other suitable employment between the time of the injury and age 65.

Recommendation No. 40

The Workmen's Compensation Board or any other governmental organization, should not deal at armslength with the Ombudsman and his office after receipt by it of a report pursuant to Section 22(3) which contains certain opinions and recommendations of the Ombudsman. That report should trigger discussions between the respective offices designed to resolve the outstanding issues if at all possible. In the future, these steps should be undertaken before the matter reaches the Committee for consideration.



MINISTRY OF THE ATTORNEY GENERAL

(1) Recommendations Nos. 41 and 42 (See Page 39)

The Ministry requested that the Committee defer any detailed discussions of these two recommendations pending the disposition of an appeal pending before the Court of Appeal of the Province of Ontario respecting the extent of the Ombudsman's jurisdiction under Section 15(1) of The Ombudsman Act in relation to the Health Disciplines Board. The Committee concurs with the Ministry's suggestion in this regard and accordingly, defers any further consideration until its next set of hearings.

MINISTRY OF COMMUNITY AND SOCIAL SERVICES

Recommendation No. 24

The Minister of Community and Social Services advised the Committee that he accepts the Committee's recommendation in principle. Having regard to the usual legislative backlog, he was unable to advise as to the timing of the legislative amendment. In the interim he has proposed that his Ministry adopt a policy whereby, as soon as the Ombudsman notifies the Board that he recommends a review of a decision, the Board will notify the director who will automatically generate a request for a re-hearing. This arrangement would serve to rectify the concern articulated by the Ombudsman in his Fourth Report, at least on an interim basis.

The Minister in accepting the recommendation, expressed some concern that any amendment should be worded in such a way as to ensure that all persons affected by a reconsideration of the Board have the opportunity to make

representation to that Board before a decision is made. Secondly, having regard to the practical problem of storing materials, the Minister feels that a time limit might be in order within which a re-hearing by the Board is permissible. The Committee agrees with the Minister's concern on both counts. IT RECOMMENDS, THEREFORE, THAT WHEN SECTION 12(11) OF THE FAMILY BENEFITS ACT IS AMENDED, IT CONTAIN THE SUBSTANCE OF THE COMMITTEE'S RECOMMENDATION WHICH IS:

"THE BOARD OF REVIEW MAY, ON APPLICATION OF ANY PARTY OR ON ITS OWN MOTION AND WITH OR WITHOUT A HEARING, RECONSIDER AND VARY ANY DECISION MADE BY IT AND IF THE BOARD HEARS FROM THE PARTIES TO THE PROCEEDINGS IN WHICH THE ORIGINAL DECISION WAS MADE, THE PROVISIONS OF THIS SECTION, EXCEPT SUBSECTION (4), APPLY MUTATIS MUTANDIS TO THE PROCEEDINGS ON SUCH RECONSIDERATION.".

AS WELL, THE AMENDMENT SHOULD CONTAIN THE SUBSTANCE OF CONCERNS EXPRESSED BY THE MINISTER THAT ALL PERSONS AFFECTED BY THE DECISION OF THE BOARD OF REVIEW BE GIVEN AN OPPORTUNITY TO MAKE REPRESENTATIONS AND A REASONABLE TIME LIMIT FOR BOARD REHEARINGS BE STIPULATED.<sup>(9)</sup>

#### MINISTRY OF CONSUMER AND COMMERCIAL RELATIONS

##### (1) Recommendations Nos. 22 and 23

The Deputy Minister advised the Committee that the Ministry is prepared to propose an amendment to Section 114(9) of Bill 163, The Residential Tenancies Act, 1978 which would remove the thirty-day period presently contained in Section 13(7) of The Residential Premises Review Act. The Committee notes that when this legislative amendment is effected and becomes

law, the need for Recommendation No. 22 will terminate. In that regard, the Ministry advised the Committee that on an interim basis, the Rent Review Board would have been prepared to comply with Recommendation No. 22 where appropriate. However, it appears that the complainants affected by this recommendation chose not to pursue the matter of judicial review. The Board was not therefore placed in a position of having to consent to any order for costs as the recommendation intended.

The Ombudsman has closed his files respecting these three cases. The Committee's recommendation therefore appears to have no further application.

#### WORKMEN'S COMPENSATION BOARD

(1) Recommendations Nos. 1, 2 and 3

Representatives of the Board reviewed with the Committee their plans for a revision and consolidation of the documentation referred to in these three recommendations. The Committee is pleased with the positive response undertaken by the Board to these matters. It has provided the Board with certain guidelines and suggestions towards implementation of this documentation. It looks forward to receiving the final product from the Board as soon as it is available for distribution.

(2) Recommendation No. 4

The Committee has just received the brief submitted to the Royal Commission of Inquiry into the Confidentiality of Health Records in the Province of Ontario and to The Commission on Freedom of Information and Individual

Privacy. The Committee will be considering these briefs in detail during its next session of hearings and will be reporting to the Legislature in more detail thereafter.

(3) Recommendation No. 7

The Committee is pleased to report that The Workmen's Compensation Board accepted this recommendation and by a decision of an Appeal Board panel on October 30, 1978, formally accepted the Ombudsman's recommendation.

(4) Recommendation No. 8

The Committee is satisfied that The Workmen's Compensation Board is working to fully implement this recommendation. The Committee looks forward to a continuation of the dialogue with The Workmen's Compensation Board on various matters immediately upon its receipt of forthcoming reports.

(5) Recommendation No. 15

The Committee was advised that a new hearing of the Appeal Board panel was held on June 18, 1979 to consider the medical referee's report received by the Board. The Committee has yet to receive information respecting the disposition of that hearing. Accordingly, the Committee recommends that The Workmen's Compensation Board forthwith advise the office of the Ombudsman and this Committee of the decision of the Appeal Board panel.

(6) Recommendation No. 17

The Committee is pleased to report that by a decision of an Appeal Board panel dated March 21, 1979, The Workmen's Compensation Board awarded



benefits to the complainant on the basis of a 10% disability. This decision has been accepted by the Ombudsman, Mr. Morand, as adequate and appropriate.

(7) Recommendation No. 19

The Board provided the Committee with a newly drafted policy respecting benefit of reasonable doubt which was approved by the corporate board on the 15th of December, 1978. The Committee considers this draft to be an improvement over the previous policies and directives used by the Board at various levels. There are, however, certain problems of interpretation and application of this policy that the Committee and the Ombudsman's office have identified which have been discussed earlier in this report at page 27.

(8) Recommendation No. 20

The Committee is still waiting upon the disposition of the hearing set by The Workmen's Compensation Board in accordance with this recommendation. The Committee is satisfied that the Board will report the result of the hearing forthwith after the decision is rendered.

(9) Recommendations Nos. 25 and 26

The Workmen's Compensation Board has decided to use the publication service of the Ministry of Government Services for the marketing and distribution of the documentation referenced by these recommendations. The Board has decided that the documentation is best distributed by combining them into four separate volumes. The price of these volumes has been fixed at \$180.00 per set which includes an updating service for three years. In addition, the documentation will be made available at approximately 160 reference and

public libraries in Ontario as well as the Board's head office and area offices. The Committee commends The Workmen's Compensation Board for its positive and thorough response to these recommendations.

(10) Recommendation No. 28

The Workmen's Compensation Board has accepted this recommendation and accordingly, an Appeal Board hearing has been held. The Board made the 5% pension increase effective from March, 1965 as recommended by the Ombudsman.

(11) Recommendation No. 29

The Committee has been advised that The Workmen's Compensation Board has now directed a new hearing by an Appeal Board panel. The Committee recommends that The Workmen's Compensation Board report to it forthwith whether and to what extent this recommendation has been implemented.

(12) Recommendations Nos. 32 and 34

The Board has conducted a hearing in accordance with this recommendation but the decision has not yet been provided to the Committee. The Committee therefore recommends that The Workmen's Compensation Board report to it forthwith on the decision recently rendered by the Appeal Board panel.

(B) TABLE OF GOVERNMENTAL ORGANIZATIONS WHICH HAVE  
MADE UNSATISFACTORY RESPONSES TO RECOMMENDATIONS  
MADE BY THE COMMITTEE IN ITS FIFTH REPORT

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MINISTRY OF THE ATTORNEY GENERAL

Recommendation No. 9

The Financial Administration Act be amended to provide that when the Ombudsman, after all necessary and appropriate requirements of The Ombudsman Act have been adhered to, makes a recommendation to a governmental organization for the payment of a sum of money, in the absence of any other express legal authority, and when the recommendation is entirely accepted by the governmental organization, a "lawful authority" is created for such money to be paid by the governmental organization out of the Consolidated Revenue Fund.

MINISTRY OF THE ATTORNEY GENERAL

(1) Recommendation No. 9

The Ministry expressed certain concerns to the Committee that this Recommendation might result in situations where the Ombudsman may, during the course of his investigation and recommendation to a governmental organization, determine a dollar value for payment to the complainant intended to represent total satisfaction of the complaint. This would abrogate the usual adversarial process whereby actions against the Crown are commenced by The Proceedings Against the Crown Act and any damages are determined through the adversarial process.

The second concern of the Ministry is that if the recommendation were implemented, someone other than a minister of the Crown and the

treasurer of the province in particular, would have authority to approve a money payment out of the consolidated revenue fund. The Ministry suggested that the recommendation should be worded to provide that the minister overseeing the particular governmental organization, should if the matter is resolved with the Ombudsman, make a recommendation to the Treasurer that the moneys in question be paid out. The Committee understands and appreciates the Ministry's concerns respecting the introduction of a process in Ontario which is foreign to lawyers who have worked for years in an adversarial setting. The reality of The Ombudsman Act is, however, that a process does now exist, albeit only with the strength of a recommendation, whereby a result may be achieved affecting the rights of parties, one of whom will be a governmental organization of the Government of Ontario, in a non-adversarial setting.

The Committee concurs with the Ministry that any procedure designed to approve the payment of a sum out of the consolidated revenue fund in the circumstances like an Ombudsman's recommendation ought to be designed to include the provision that the minister representing the governmental organization in question is the one who approves the recommendation for payment out of the consolidated revenue fund.

The Committee, however, disagrees with the Ministry that payments of this sort should only be approved where a legal right or obligation to pay such money can be identified. The Ombudsman Act does contemplate situations wherein the Ombudsman may rightfully recommend the payment of a sum of money for reasons which may not meet the strict legal requirements expected in the legal system. Therefore the Committee recommends that THE FINANCIAL ADMINISTRATION ACT BE AMENDED TO PROVIDE THAT WHEN THE



OMBUDSMAN, AFTER ALL NECESSARY AND APPROPRIATE REQUIREMENTS OF THE OMBUDSMAN ACT HAVE BEEN ADHERED TO, MAKES A RECOMMENDATION TO A GOVERNMENTAL ORGANIZATION FOR THE PAYMENT OF A SUM OF MONEY, IN THE ABSENCE OF ANY OTHER EXPRESS LEGAL AUTHORITY, AND WHEN THE RECOMMENDATION IS ENTIRELY ACCEPTED BY THE GOVERNMENTAL ORGANIZATION, A "LAWFUL AUTHORITY" IS CREATED FOR SUCH MONEY TO BE PAID BY THE GOVERNMENTAL ORGANIZATION OUT OF THE CONSOLIDATED REVENUE FUND UPON RECOMMENDATION TO THE TREASURER FOR PAYMENT OF SUCH MONEY BY THE MINISTER RESPONSIBLE FOR THE GOVERNMENTAL ORGANIZATION.<sup>(10)</sup>

- (C) SUMMARY OF CASES SINCE THE INCEPTION OF THE OFFICE OF THE OMBUDSMAN WHERE (1) A RECOMMENDATION UNDER SECTION 22(3) OF THE OMBUDSMAN ACT WAS DENIED BY THE GOVERNMENTAL ORGANIZATION TO WHICH IT WAS ADDRESSED; (2) A RECOMMENDATION MADE PURSUANT TO SECTION 22(3) OF THE OMBUDSMAN ACT THAT A PRACTICE BE ALTERED OR A LAW RECONSIDERED
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As a means of taking inventory of all the cases referred to above, the Ombudsman appended to his Sixth Report two charts (pages 146 to 170 inclusive) which summarized the recommendations made under the appropriate categories and the disposition of those recommendations by the Select Committee and/or the governmental organization to which they were directed. These charts are a welcome addition to the Ombudsman's Report. They provide a valuable means of monitoring the actions taken by governmental organizations to Ombudsman recommendations. They serve as well as a complement to the Committee's efforts, since its Third Report, in reporting on responses made by governmental organizations to recommendations addressed by it in previous reports.

The Committee commends the Ombudsman for this innovative approach. It suggests he make it a permanent part of his reporting system and that it be expanded to include all the matters wherein the Select Committee has made recommendations to governmental organizations. The combination of those sets of information in these charts, on an updated basis, will serve as an effective vehicle to ensure that an ultimate disposition is reached for every recommendation made by the Ombudsman and by this Committee.

Subsequent to the tabling of the Ombudsman's Sixth Report, the Committee requested responses from all the governmental organizations named in the Ombudsman's charts.

These responses received by the Committee were generally satisfactory.

With respect to the responses as they affect the Ombudsman's recommendations, the Ombudsman will be reporting to the Committee whether in his opinion, further consideration must be given to the matters at hand. The Committee will therefore be reporting on these responses in more detail in its next report.

## PART V

### SPECIFIC CASE SUMMARIES REPORTED BY THE OMBUDSMAN AS CONTAINING RECOMMENDATIONS MADE TO GOVERNMENTAL ORGANIZATIONS WHICH HAVE BEEN DENIED

In his Sixth Report, the Ombudsman referenced eleven cases which fall into the category of so-called Recommendations Denied cases. That is, cases wherein the recommendations made by the Ombudsman pursuant to Section 22 of The Ombudsman Act, have been for whatever reason not implemented by the governmental organization in question and the Ombudsman wishes to have his recommendations ultimately supported by this Committee and the Legislature. In its Fifth Report, the Committee recommended the formulation of a general rule requiring the Ombudsman in circumstances wherein he wished the ultimate support for his recommendations to first refer his report to the Premier in accordance with Section 22(4) of The Ombudsman Act. This Committee has consistently informed the Ombudsman prior to his Sixth Report that any cases not referred to the Premier pursuant to Section 22(4), would not have their recommendations supported by this Committee nor recommended for support by this Committee to the Legislature.

The Ombudsman's Sixth Report contains three cases (Ministry of Consumer and Commercial Relations, Complaint #6 at page 39, Workmen's Compensation Board, Complaints #34 and #35, pages 105-112 inclusive) wherein although the Ombudsman did not apparently consider the governmental organization's response to be adequate and appropriate, he nonetheless decided not to refer the matter to the Premier pursuant to Section 22(4).

In the result, the Committee does not support the recommendations of the Ombudsman made in these cases. Accordingly, it will not be making any recommendation to the Legislature that the recommendations contained in these cases be approved and adopted.

By adopting this position the Committee does not intend to comment one way or the other on the relative merits of the recommendations made by the Ombudsman and the responses of the governmental organizations thereto. Rather, the Committee has made as a substantive requirement to support for the Ombudsman's recommendations, a reference of the cases in question to the Premier beforehand pursuant to Section 22(4) of The Ombudsman Act. That substantive requirement not having been followed in these three cases with the aforeknowledge of the Select Committee's position, the Ombudsman must be taken to have decided beforehand not to seek the support of this Committee and the Legislature for the recommendations in question.

It is unfortunate that these three cases were categorized in the Ombudsman's report as "recommendation denied". This type of case carries a connotation that the governmental organization in question has for whatever reason not implemented the Ombudsman's recommendations and the Ombudsman is unable to accept or agree with the reasons for so doing. That is not contemplated by the legislation and Section 22(4) in particular.

#### MINISTRY OF EDUCATION - COLLEGES AND UNIVERSITIES

(1) Complaint #2, page 22, Ombudsman's Sixth Report

This complaint, received by the Ombudsman's office in June, 1976 was to the effect that the then Ministry of Colleges and Universities had refused



a grant to the complainant applied for under the Ontario Student Assistance Program. Applications for grants, made for each of the academic years 1974-1975, 1975-1976, and 1976-1977, were denied on the grounds that the complainant did not comply with the regulations made under the Ministry of Colleges and Universities Act, 1971 then in force. The regulations in force at the time required that an applicant be "a Canadian citizen or a person lawfully admitted to Canada for permanent residence, who is ordinarily resident in Canada and, except for time at a post-secondary institution, has resided in Ontario for at least twelve consecutive months prior to the first day of the month in which classes normally commence in the eligible institution for the academic year for which he is applying for a grant . . .". For the first year in which the applications were made (1974-1975) the complainant had not resided in Ontario for at least twelve consecutive months prior to the first day of the month in which classes normally commence. Accordingly, the Ombudsman concluded that the decision of the Ministry denying the complainant a grant for that year was properly based on the law.

However, the Ombudsman concluded that the complainant did meet the requisite residency requirements for the academic years 1975-1976 and 1976-1977 and that, but for the clause in the regulation that excludes time spent at post-secondary institutions from the calculation of the twelve consecutive months provision, the complainant would have been eligible in those subsequent academic years for a grant. In other words, the only way this complainant could have become eligible under the regulations for a grant in subsequent academic years would have been to interrupt the academic course in question for a twelve-month period all the while remaining in Ontario to satisfy the provisions of the regulations.

After his investigation was completed, the Ombudsman concluded that it was unjust that the complainant was denied consideration for a grant in the academic years 1975-1976 and 1976-1977 because the exclusionary clause deemed the complainant to be a non-resident for this purpose and did not allow the Minister of Colleges and Universities to find that the complainant actually resided in Ontario for twelve months prior to the months in which the classes commenced in the relevant academic years. Pursuant to Section 22(1) of The Ombudsman Act, the Ombudsman formed the opinion that the decision of the Minister of Colleges and Universities which denied the complainant grants for the academic years in question was in accordance with a regulation, the interpretation of which may be wrong or if the interpretation is not wrong, then the decision is in accordance with the provision of an Act that is unjust.

Accordingly, the Ombudsman recommended pursuant to Section 22(3) of The Ombudsman Act:

- "(1) That the interpretation of the Ontario Regulation 115/75, Section 1(g) which caused (the complainant's) application for Ontario Student Assistance to be refused, be reconsidered; or in the alternative,
- (2) That Ontario Regulation 115/75, Section 1(g) be reconsidered and amended retroactively to August 31, 1975 so that (the complainant) would have been eligible to qualify for a grant for ( ) 1975-1976 academic year and the 1976-1977 academic year; and
- (3) That following the acceptance of (1) or (2) above, (the complainant) be considered for Ontario Student Assistance on the basis of ( ) applications in ( ) respective eligible year nunc pro tunc."

The Minister of Colleges and Universities in his response to the Ombudsman's recommendations, essentially agreed in principle that the eligibility provisions of the regulations be changed so as to permit similar applicants in the future to gain eligibility requirements during their stay at a post-secondary academic institution in Ontario. In other words, applicants will no longer have to "sit out" a year in order to gain the twelve-month eligibility requirement. However, the Minister was unable to accept the Ombudsman's recommendation that the regulations be amended retroactively and applied specifically to the complainant in question.

The regulations made under the Ministry of Colleges and Universities Act, 1971 (Regulation 115/75) was revoked and replaced by Ontario Regulation 638/78. That regulation permitted the Ontario Student Assistance Program to consider as a basis of eligibility the previous twelve months the applicant had spent at a post-secondary academic institution in Ontario.

Therefore the only issue outstanding between the Ombudsman in his recommendation and the Ministry in its ultimate response, was whether the eligibility provision should be made retroactive to apply to this particular complainant. It is to be noted that the Ombudsman's office in making the recommendation for retroactivity acknowledged and understood that the retroactive provisions would apply to all other eligible applicants coming within the eligibility requirements thereunder.

The Committee is unable to support the recommendations of the Ombudsman in this case. In the first place the Ministry of Colleges and Universities Act, 1971, does not specifically allow for retroactive regulations. It is not legally possible to enact retroactive regulations unless the authority to so

enact is specifically contained in the legislation under which the regulations can be formulated.

In the second place and in any event of whether or not the statute permitted retroactive regulations, the Committee is not prepared to support the Ombudsman's recommendation in this case since it would in all probability result in an unnecessary burden on the taxpayers of the Province of Ontario. The Committee was advised that the Ministry did not, for the years in question, budget for any applications which would be approved under this successful regulation. Any monies therefore necessary to fund this change of policy, would have to come from current revenue sources. When one considers that any successful applicants in 1979 have probably completed or terminated their post-secondary academic training and in all probability are earning income in excess of the general average, then such expenditures take on the character of unnecessary burdens on the taxpayers of the Province of Ontario.

In the Committee's opinion, the hardships and adverse affects of enacting such retroactive regulations far outweigh the benefits that might accrue to a relatively few number of residents of the Province of Ontario who have had the opportunity of attending post-secondary academic institutions in this province.

#### MINISTRY OF HEALTH

(1) Complaint #21, page 70, Ombudsman's Sixth Report

This case involves two complaints received from separate complainants to the effect that the Ontario Health Insurance Plan refused to reimburse the complainants for bona fide medical treatment received outside the



Province of Ontario for more than 90% of that which is or would be provided in the Ontario Medical Association Fee Schedule.

Both complainants were required to receive hospital, medical and other related services in the United States which services, it was believed by them, were not available in Ontario. In both cases, the amount paid by the Ontario Health Insurance Plan for medical services was substantially less than the fee for services rendered in the United States to the complainant by the attending physician.

The amounts fixed by the General Manager of the Ontario Health Insurance Plan for payment by the Plan were arrived at after advice from the Ontario Medical Association as to what its fee would have been had the service been available in Ontario. The General Manager advised the Committee that when application for payment of medical services is made which services are not available in Ontario, he will fix as a basis for reimbursement an amount which the Ontario Medical Association advises him would be included in its schedule had the service been available in Ontario.

After the Ombudsman's investigation was completed, he formed the opinion that the decision of the Ontario Health Insurance Plan not to reimburse those individuals who must bona fide seek necessary medical treatment outside the Province of Ontario more than 90% of the O.M.A. Fee Schedule is in accordance with a provision of The Health Insurance Act that is "unreasonable" and "oppressive" within the meaning of Section 22(1)(b) of The Ombudsman Act.

The Ombudsman ultimately recommended that The Health Insurance Act and if necessary the Regulations thereunder,

"be amended to provide that those subscribers who obtain the prior approval of the General Manager of the Plan have their medical fees, incurred for insured services performed outside the Province of Ontario, paid by the Plan to an extent substantially greater than would otherwise be paid for an analogous service listed in the O.M.A. Fee Schedule."

The Deputy Minister responded to the Ombudsman that the Ministry was not in a position at this time to recommend an amendment to The Health Insurance Act in terms of the Ombudsman's recommendations. The Deputy Minister stated that:

"Charges by physicians in the United States vary considerably and I understand that reference is not made in most of the States to a standard fee schedule as is the case in Ontario. I am informed by officials of O.H.I.P. that there may be a tendency in certain areas to charge tourists whatever the 'traffic will bear'. In our opinion a more rational and universal system of suggested charges by physicians should be available in the various States before any considerations are made for changes in policy."

In addition to the foregoing, the General Manager of the Plan advised the Committee that an amendment as recommended by the Ombudsman would create greater administrative and financial burdens on the Plan than presently exist.

The General Manager also advised the Committee that such an amendment as recommended by the Ombudsman imposes an additional decision-making function on him which may be subject to the principles of natural justice and administrative fairness. That is, a General Manager with such an authority may have to afford parties an opportunity to be "heard" on the matter before making a final decision. This is, of course, more time-consuming than the

present practice and procedure of the General Manager in these matters wherein he seeks and acts on the advice of the Ontario Medical Association.

The Committee is unable to support the recommendation of the Ombudsman as worded and as understood by the Ministry of Health. However, the Committee does support the principle behind the Ombudsman's recommendation that in appropriate circumstances residents of Ontario receiving medical services outside the Province of Ontario which services are not available within the Province of Ontario, should receive some reimbursement for those services in excess of that which is stipulated or recommended to the General Manager by the Ontario Medical Association. The Committee agrees with the Ombudsman that these cases are unique and frequently involve a "matter of life and death" and as such should be treated accordingly by the Plan. Since the cases do come within the unique and life-giving categories, they should be relatively few. The Committee is not suggesting that the General Manager should not consult the Ontario Medical Association on these matters, nor having consulted it, should he disregard its advice. However, in situations as contemplated by the Ombudsman's recommendation, the General Manager should not confine himself to advice from the Ontario Medical Association. Where the applicant can demonstrate just cause for additional reimbursement, the General Manager ought to have the discretion to fix a higher amount for payment under the Plan and ought to exercise that discretion in the applicant's favour.

The Committee notes that the Deputy Minister, in a letter dated November 21, 1978 to the Ombudsman (See Schedule "F") stated that:

"The Health Insurance Amendment Act provides that:

'Where the amount payable by the Plan for an insured service rendered by a physician is not prescribed by the Regulations, it is the function of the General Manager and he has the power to determine the amount.'

As you are no doubt aware there is a wide discrepancy in fees submitted by physicians from the United States. There must be some discretion allowed for on the part of the General Manager, as proposed in The Health Amendment Act to ensure the fair and reasonable use of the Plan."

The Health Insurance Amendment Act referred to in the Deputy Minister's letter was never tabled by the Minister of Health in the Legislature. For some reason the Ministry decided against the amendment for the present time. However, it can be taken to be a statement of Ministry policy as at November 21, 1978 that in some circumstances the General Manager has the function and power to determine an amount payable by the Plan for service not prescribed by the Regulations. That statement of policy does not fetter or limit the General Manager's abilities to seek only the advice of the O.M.A. It would, in the Committee's opinion, permit the General Manager to approve a payment exactly in the way as contemplated by the Ombudsman in his recommendation. ACCORDINGLY, THE COMMITTEE SUPPORTS THE SUBSTANCE OF THE OMBUDSMAN'S RECOMMENDATION AND RECOMMENDS TO THE LEGISLATURE FOR APPROVAL AND ADOPTION THAT THE MINISTRY OF HEALTH CAUSE AN AMENDMENT TO BE MADE TO THE HEALTH INSURANCE ACT PROVIDING THAT:

"WHERE THE AMOUNT PAYABLE BY THE PLAN FOR AN INSURED SERVICE RENDERED BY A PHYSICIAN IS NOT PRESCRIBED BY THE REGULATIONS, IT IS THE FUNCTION OF THE GENERAL MANAGER AND HE HAS THE POWER TO DETERMINE THE AMOUNT." (11)



In making this recommendation the Committee recognizes that it is not to be made applicable nor for the benefit of the two complainants who were the subject matter of the Ombudsman's investigation. The recommendation is intended to afford all persons coming within similar circumstances hereafter to have some ability to persuade the General Manager to approve reimbursement for medical services outside the Province of Ontario in some greater proportion.

#### WORKMEN'S COMPENSATION BOARD

Complaint Numbers 36, 37, 38 and 39  
pages 108-131 inclusive, Ombudsman's Sixth Report

(1) Complaint #36

As a further response to the recommendation of the Ombudsman, The Workmen's Compensation Board ordered a new hearing which took place on the 16th day of August, 1979. At the request of the Ombudsman, the Committee deferred any further consideration of this matter pending the Ombudsman's receipt and consideration of the Appeal Board decision.

On the 27th of September, 1979 The Workmen's Compensation Board issued a decision which awarded the complainant entitlement for a low back disability as a result of the aggravating effects of the compensable accident in question. The Board directed that the extent of the complainant's disability be assessed by the Pensions Branch and that full arrears be paid from April 19th, 1956.

The Ombudsman has accepted this decision as an adequate and appropriate response to his recommendation.

The Committee wishes to commend the Board for its efforts in resolving this complaint. On September 6th, 1979 the Board issued a decision which totally rejected the Ombudsman's recommendations. Subsequently, at the direction of Mr. L. O'Brien, Ombudsman Administrator of the Board, the Director of the Medical Branch of the Board considered the prevailing medical evidence and concluded, in effect, that the accident in question did in some measure cause the continuing symptoms. The procedure employed by Mr. O'Brien in this case proved to be the effective means to resolve a difference between the Board and the Ombudsman in interpretation of prevailing medical opinions. It is a procedure which in some form the Committee believes should be employed in all cases where such a difference in interpretation exists.

However, the Board should not wait until the "11th hour" before employing such a procedure. The Committee was informed of the Board's decision just as it was about to consider this case in detail. While the Committee applauds the result, it regrets that some expense was wasted in preparing for and setting up one of its meetings. The Committee hopes the Board in the future will act so as to avoid to itself and the Committee, unnecessary expense of time and money.

(2) Complaint #37

This case concerns a complaint in respect of an Appeal Board decision dated December 30th, 1976, which denied the complainant entitlement to a permanent partial disability pension for disability respecting the low back area caused by a compensable accident in October, 1958.

The Ombudsman's investigation revealed that the complainant had complained of symptoms referable to his lower back since the October 1958 accident. He has been treated by two orthopedic specialists at various times since 1958 in part for these symptoms. One orthopedic specialist has from time to time requested of The Workmen's Compensation Board that they supply and pay for a "Harris brace" to be worn by the complainant to minimize the affects of the low back condition. On each occasion the Board has supplied and paid for such a brace. Additionally, The Workmen's Compensation Board has on at least one occasion pursuant to Section 51(3)(b) of The Workmen's Compensation Act, paid for damage caused to the complainant's clothing by virtue of the wearing of the Harris back brace. That section only makes a clothing allowance available to injured workers whose clothing is damaged by reason of the wearing of the brace for a permanent back disability. In other words, the Board must acknowledge the existence of the disability before paying the clothing allowance.

Representatives of The Workmen's Compensation Board were unable to give any reasons as found in the Board's file for the supplying of the Harris braces from time to time which were inconsistent with the existence of a low back disability. Further the Board advised the Committee and the Ombudsman that the payment of the clothing allowance was an "administrative error".

The Workmen's Compensation Board refused to implement the Ombudsman's recommendation essentially for the reason that the medical reports on the Board file do not demonstrate that the complainant had any significant low back disability. The Board acknowledged that the available medical opinions indicated some low back disability but not of a degree to warrant a disability pension.

The Committee supports the recommendation of the Ombudsman in this case. The reasons given by The Workmen's Compensation Board for the supply of the Harris brace to the complainant and to the payment of the clothing allowance for damage to clothing caused indirectly by a low back disability, are not satisfactory. The complainant, his attending orthopedic physicians, and the Ombudsman have for various reasons and in varying degrees relied upon the supply of the Harris brace and the payment of the clothing allowance as an acknowledgment by The Workmen's Compensation Board of a low back disability. It is inconsistent with the actions of The Workmen's Compensation Board vis-a-vis this low back condition to continuously deny entitlement to benefits.

Accordingly, the Committee recommends that THE WORKMEN'S COMPENSATION BOARD REVOKE ITS DECISION OF DECEMBER 30, 1976 AND GRANT THE COMPLAINANT A PERMANENT PARTIAL DISABILITY PENSION FOR THE DISABILITY REFERABLE TO HIS LOWER BACK CAUSED BY THE COMPENSABLE ACCIDENT IN OCTOBER, 1958.<sup>(12)</sup>

(3) Complaint #38

This case involved a complaint respecting a decision rendered by the Appeal Board of The Workmen's Compensation Board on December 15th, 1971, which decision found that the "post-traumatic neurosis" suffered by the complainant was not related to the industrial accident suffered on the 19th of December, 1969 and accordingly denied the complainant entitlement to benefits.

The sole issue outstanding between the Ombudsman and The Workmen's Compensation Board in this case is whether or not the symptoms caused by the post-traumatic neurosis are causally related to the industrial



accident referred to above. On the one hand, The Workmen's Compensation Board relies upon the medical opinion of a psychiatrist who is of the opinion that any symptoms suffered by the complainant were caused by other factors and not related to the industrial accident. Although this psychiatrist uses the term "post-traumatic neurosis" he did not relate it to the accident in question.

On the other hand, the Ombudsman's office obtained an opinion, during the course of their investigation, from a psychiatrist who reviewed the medical history of the complainant, examined him personally and provided the Ombudsman with a medical opinion dated the 30th of September, 1977 that the compensable accident and the injuries suffered thereby were precipitating and important factors in the development of the symptoms from which the complainant is continuously suffering. In his report, a copy of which has been provided to The Workmen's Compensation Board, the doctor expressed his opinion that:

"there is little doubt in my mind that (the complainant) would not be in his present situation if not for the injuries. I do not feel that a similar, a non-compensable injury, would have left him with the same problem. Unfortunately, it is difficult to say that the injury was the major factor, it was one of a number, . . . I do not feel that this man's personality configuration or constitution predisposed in a major way to his present problem."

During the course of the Ombudsman's investigation and principally as a result of the opinion obtained by the Ombudsman's office, the Ombudsman, in his notice to The Workmen's Compensation Board pursuant to Section 19(3) of The Ombudsman Act, advised that it would be open for him to conclude that the Appeal Board was wrong in failing to recognize any relationship between the complainant's ongoing post-traumatic neurosis and the industrial accident of

December 19, 1969, thereby denying the complainant any entitlement to a permanent disability pension. Accordingly, the Ombudsman advised the Board of a possible recommendation that the Appeal Board should reconsider their decision of December 15, 1971 in light of the medical opinion obtained by the Ombudsman's office.

The Workmen's Compensation Board, in response to that "19(3)" notice, advised the Ombudsman that the Board was not prepared to implement his possible recommendation, preferring rather to rely upon the medical referee's report obtained by the Board in 1971.

The Ombudsman subsequently, in his report to The Workmen's Compensation Board pursuant to Section 22(3) of The Ombudsman Act, expressed the opinion that the Appeal Board's refusal, made in February, 1978, to reconsider its decision of December 15, 1971 in light of the medical report obtained by the Ombudsman dated September 30, 1977 is unreasonable. The Ombudsman accordingly recommended pursuant to Section 22(3)(a) of the Ombudsman's report that the Appeal Board should reconsider its December 15, 1971 decision in light of the new medical evidence with a view to granting the complainant entitlement to a permanent disability award for a disability diagnosed as post-traumatic neurosis, such benefits retroactive to June 4, 1971.

In other words, the opinion formulated by the Ombudsman pursuant to Section 22(1) as to the unreasonableness of The Workmen's Compensation Board refers not to the original decision of the Board in 1971 which was the subject matter of the Ombudsman's investigation, but to a "decision, recommendation, act or omission" made by The Workmen's Compensation Board during the course of the Ombudsman's investigation and only in direct response to a possible

conclusion and possible recommendation as set forth in the notice to The Workmen's Compensation Board pursuant to Section 19(3) of The Ombudsman Act. In simple terms, the Ombudsman has during the course of an investigation created or caused the governmental organization in question to make a decision, recommendation, act or omission in respect of which an opinion is formulated and a recommendation made pursuant to Section 22 of the Act.

In the Committee's opinion this approach and interpretation of The Ombudsman Act was never intended by the Legislature. In effect, it cast the Ombudsman in an adversarial role vis-a-vis the governmental organization. This approach, in the Committee's opinion, can only undermine the critical working relationships that must exist with the Ombudsman's office by governmental organizations, and the respect that governmental organizations must have for Ombudsman reports when issued.

If this procedure is taken to its extreme, a governmental organization is at risk of having any of its decisions, recommendations, acts or omissions during and as a direct result of the Ombudsman's investigation, form the subject matter of a report pursuant to Section 22 of the Act.

In the Committee's opinion, the process and function of the Ombudsman must have continuity and consistency with respect to the decision, recommendation, act or omission made by a governmental organization which is the subject matter of the complaint and which is the matter which the Ombudsman decides to investigate. Any investigation conducted by his office is in respect to that original decision made. It must follow that any opinion formulated by the Ombudsman and any recommendation made by him pursuant to

Section 22 of his Act must refer to the original decision, recommendation, act or omission.

It is unfortunate that the Ombudsman and his office adopted this approach in this case. It has detracted from the merits of the Ombudsman's position and has clouded the fact that there may be current and significant psychiatric opinions respecting the relationship between the complainant's post-traumatic neurosis and the compensable accident.

The Committee notes that The Workmen's Compensation Board has never been taken by surprise or in any way misled as to the thrust of the Ombudsman's recommendation in this case. The Ombudsman is convinced that there is sufficient current medical opinion to warrant The Workmen's Compensation Board to reconsider its 1971 decision. The Board, on the other hand, does not consider the new medical information "further significant new factual information" which they seem to require in order to reconsider a decision which is based upon a medical referee's conclusive report. In the Committee's opinion this is a case which must be reconsidered by The Workmen's Compensation Board pursuant to Section 75 of The Workmen's Compensation Act. The Committee notes the advice from representatives of the Board that the Board's standard for deciding when to reconsider decisions based on psychiatric opinions of a medical referee which the Board has deemed to be conclusive, does not differ from any other standard for a decision based on any other type of medical referee's opinion. Accordingly, the Committee recommends that THE WORKMEN'S COMPENSATION BOARD RECONSIDER, BY HEARING, ITS DECISION OF DECEMBER 15, 1971. IN THAT HEARING THE BOARD SHOULD AT LEAST HEAR FRESH EVIDENCE RESPECTING THE RELATIONSHIP BETWEEN THE



COMPLAINANT'S SYMPTOMS AND THE COMPENSABLE ACCIDENT BOTH FROM THE MEDICAL REFEREE APPOINTED IN 1971 AND THE PSYCHIATRIST RETAINED BY THE OMBUDSMAN DURING THE COURSE OF HIS INVESTIGATION.<sup>(13)</sup>

(4) Complaint #39

This complaint, received on July 9, 1976, concerns a decision of the Appeal Board Panel of The Workmen's Compensation Board dated June 24, 1976 which refused to increase the complainant's benefits beyond the 50% temporary partial benefits from March 8, 1971 to September 15, 1975 for an aggravation of a pre-existing liver condition and a 40% provisional pension from September 15, 1975 to September 18, 1978 for a psychological disability related to the treatment for the liver dysfunction.

During the period May 1968 to March 1971, the complainant worked in an environment which exposed him to hydrocarbon fumes from various chemical substances used by the employer in the course of its business. As a result the complainant suffered at least an aggravation of a pre-existing liver condition all of which combined to develop an organic liver dysfunction. As a result of the treatments required by the complainant from 1975 forward an iatrogenic psychiatric disability developed. That is, a disability caused by or precipitated by the treatment process necessary for the organic liver dysfunction. The Workmen's Compensation Board recognized that this iatrogenic disability was in some way caused by the work-related incident and accordingly awarded the 40% provisional pension from September 15, 1975 to September 18, 1978.

At the time the matter was considered by the Committee the only remaining issue between the Ombudsman and The Workmen's Compensation Board was the amount of provisional pension to be awarded to the complainant for the psychological disability caused by the treatment referable to the organic liver dysfunction. The Ombudsman's office on the one hand concluded that the pension should be 100%. The Workmen's Compensation Board as confirmed in their June 1976 decision, maintained that the 40% disability benefit was adequate compensation.

During the course of the Ombudsman's investigation he confirmed the opinion given to The Workmen's Compensation Board in 1975 by the psychiatrist retained by it for the purpose of assessing the complainant's psychiatric disability, that the disability was totally attributable to the numerous medical examinations the complainant had been subjected to for the liver dysfunction and the complainant's preoccupation with the liver dysfunction consequent thereto. In other words, the Ombudsman satisfied himself that the Board's consulting psychiatrist was and continues to be of the opinion that the psychological disability is 100% related to the liver dysfunction.

The Workmen's Compensation Board on the other hand, relying upon the opinion of an internal specialist retained to assist the Board to respond to the Ombudsman's recommendation, remains of the view that although the complainant suffered virtually 100% disability on the basis of a psychological disturbance, the disability is not caused 100% by the organic liver dysfunction. There is some concern that the psychological disability may in some measure be related to brain damage.

After the Ombudsman concluded his investigation he formed the opinion, with respect to the Board's assessment of the psychological disability, that the Appeal Board in its decision of June 24, 1976 was unreasonable to deny the complainant the full and continuing compensation benefits for the psychological disability, particularly so when it is considered that the Board's consulting psychiatrist had wholly related the disability to the liver dysfunction. Accordingly, the Ombudsman recommended that:

"the decision of The Workmen's Compensation Board in this case be varied and that the complainant be granted a 100% provisional pension from September 15th, 1975 to September 18th, 1978 for a psychological disability arising out of the treatment for a compensable liver dysfunction".

The Ombudsman further recommended that pursuant to Section 75 of The Workmen's Compensation Act the Board reconsider its June 24, 1976 decision and grant the complainant a new hearing to establish the total organic disability. This latter recommendation was subsequently abandoned by the Ombudsman due to the fact that The Workmen's Compensation Board despite efforts, was unable to arrange for a full and necessary medical assessment of the complainant for the purpose of any re-hearing.

The Committee is unable to support the recommendation of the Ombudsman in this case with respect to the 100% provisional pension from September 15, 1976 to September 15, 1978 for a psychological disability. Notwithstanding that the consulting psychiatrist retained by the Board confirmed to a representative of the Ombudsman's office in July, 1977 that the psychological disability was wholly related to the liver dysfunction, the most recent examination by an acknowledged leader in the field of internal medicine,

raises the issues of other causes of the disability which may be organic in nature. To support a provisional pension award as recommended by the Ombudsman without further study may render a disservice to both the complainant and The Workmen's Compensation Board.

The Committee is also unwilling to support a recommendation of the Ombudsman which, in effect, assumes the role reserved to The Workmen's Compensation Board to quantify and assess pension awards. While the Ombudsman in this case may be perfectly justified in formulating an opinion that a disability award should be increased, the Committee does not believe he or his office has the expertise to actually quantify that amount. The Ombudsman has on other occasions declined to embark upon that exercise. The Committee does not see any reason in this case for differing from that approach.

The Committee is of the opinion however that the complainant is entitled to more benefits than he has yet received from The Workmen's Compensation Board for any compensable symptom related to the liver dysfunction. It would be impossible however to properly assess the increase in benefits to which the complainant is entitled without a new hearing and without a new psychiatric examination of the complainant.

Accordingly, the Committee recommends that THE WORKMEN'S COMPENSATION BOARD RECONSIDER, BY HEARING, THIS MATTER PURSUANT TO SECTION 75 OF THE WORKMEN'S COMPENSATION ACT TO DETERMINE THE EXTENT TO WHICH TOTAL BENEFITS PAID TO THIS COMPLAINANT SHOULD BE INCREASED.<sup>(14)</sup> The Committee further recommends that FOR THE PURPOSE OF THE HEARING, THE WORKMEN'S COMPENSATION BOARD ARRANGE FOR THE COMPLAINANT TO BE



EXAMINED BY ITS CONSULTING PSYCHIATRIST WHO ORIGINALLY EXAMINED THE COMPLAINANT IN MAY OF 1975 AND THAT THE PSYCHIATRIST BE REQUIRED TO EXPRESS AN OPINION SPECIFICALLY AS TO WHAT PROPORTION OF THE PSYCHIATRIC DISABILITY SUFFERED BY THE COMPLAINANT IS ATTRIBUTABLE TO THE ORGANIC LIVER DYSFUNCTION.<sup>(15)</sup>

(5) Complaint #77, Ombudsman's Fourth Report

The Committee's Fifth Report (pages 66-69) reported on its consideration of this case as follows:

"This complaint concerns a decision of the Appeal Board of The Workmen's Compensation Board dated June 3, 1976 which denied the complainant compensation for a pre-existing spinal condition on the grounds that the cause of the condition is not related to anything which arose out of or occurred during the course of employment. The complainant contended on the appeal that the accidents which occurred during the course of employment at the material times aggravated in some way the pre-existing spinal condition and accordingly, he should, in some proportion, be compensated by the Board.

The circumstances of the complaint and the Ombudsman's investigation are set out in the text of the Ombudsman's Fourth Report.

After the Ombudsman's investigation was completed, he formed the opinion that the Board should confer the benefit of doubt on the complainant and should grant a permanent partial disability pension. In his opinion, the Appeal Board decision referred to above unreasonably denied the complainant entitlement to such a pension. Accordingly, he recommended that The Workmen's Compensation Board vary the Appeal Board's decision of June 3, 1976 and award a permanent partial disability pension to the complainant for the residual disability of the relevant compensable injuries sustained during the course of employment.

The Committee understands the basis of the Ombudsman's opinion to be that the benefit of doubt should be granted in that there is no unequivocal opinion by any physician to the effect that the accidents occurring during the course of employment either did or did not aggravate the pre-existing spinal condition. In fact, the Ombudsman's office is of the view that the prevailing medical opinions more support the complainant's assertion rather than the Board's.

The Board declined to implement the Ombudsman's recommendation on the grounds that there is no evidence to support the contention that the pre-existing condition and the symptoms emanating therefrom has been

significantly changed by the relevant accidents which occurred during the course of employment. The Board further expressed the opinion that any disability which might be present and measurable at the present time would be the result of the underlying pre-existing condition and not the work incidents.

The Board representative appearing before the Committee advised that the Board never considered applying the doctrine of benefit of doubt because the Board felt that the prevailing medical opinions supported the Board's conclusions.

A member of the Appeal Board Panel which made the decision of June 3, 1976 appeared before the Committee. He advised that a certain medical opinion referred to by the Ombudsman in his Report to the Board pursuant to Section 22(3) of The Ombudsman Act to the effect that it would be quite impossible to produce medical evidence stating that the complainant has no residual disability as a result of the compensable accidents was not considered by the Board in formulating its response to the Ombudsman's Report.

The Ombudsman's office was unable to produce a written medical opinion in the terms referred to above. The Ombudsman's Report merely paraphrases a conversation a member of the Ombudsman's staff had with the doctor in

question. The Committee considers the opinion of the physician in question to be critical and certainly if confirmed by this doctor in a written medical report, would make the application of the doctrine of benefit of the doubt, if, as and when formulated by the Board, applicable. Accordingly, the Committee recommends that THE OMBUDSMAN FORTHWITH OBTAIN A MEDICAL REPORT FROM THE DOCTOR IN QUESTION IN RESPECT OF THE OPINION ATTRIBUTED TO HIM IN THE OMBUDSMAN'S REPORT PURSUANT TO SECTION 22(3) OF THE OMBUDSMAN ACT. THAT REPORT WHEN RECEIVED BY THE OMBUDSMAN SHALL BE FORTHWITH TRANSMITTED TO THE WORKMEN'S COMPENSATION BOARD.<sup>(31)</sup> The Committee further recommends that THE WORKMEN'S COMPENSATION BOARD UPON RECEIPT OF THAT MEDICAL REPORT CONDUCT A HEARING PURSUANT TO SECTION 75 OF THE WORKMEN'S COMPENSATION ACT AND THAT THE APPEAL BOARD PANEL PRESIDING AT THAT HEARING CONSIDER THE APPLICATION OF THE POLICY OF BENEFIT OF THE DOUBT TO THE CIRCUMSTANCES OF THIS CASE.<sup>(32)</sup>

The Committee is mindful that The Workmen's Compensation Board will consider all relevant medical evidence received by it either from the doctor in person or by means of a medical report signed by the doctor in



question. The Committee accordingly recommends that  
HEREAFTER THE OMBUDSMAN ENSURE THAT ANY  
MEDICAL EVIDENCE RELIED UPON BY HIM IN  
SUPPORT OF HIS OPINIONS AND RECOMMENDATIONS  
BE OBTAINED IN WRITTEN REPORTS WHICH CAN BE  
READILY MADE AVAILABLE TO THE WORKMEN'S  
COMPENSATION BOARD.<sup>(33)</sup>

The Committee has in previous reports commented upon  
the obligations incumbent on the Ombudsman in  
performing Ombudsman functions and in particular  
making reports pursuant to Section 22(3) of The  
Ombudsman Act. The Committee wishes to say that  
there are also obligations on the governmental organiza-  
tions in question who receive those reports to make their  
responses as complete and thorough as possible. Where, in  
the preparation of those responses, the governmental  
organization believes some aspect of the Ombudsman's  
report requires clarification or if additional information is  
necessary, the governmental organization should obtain  
the information from the Ombudsman or his staff as  
quickly as possible. The Committee is of the opinion that  
a freer dialogue between the Ombudsman and the govern-  
mental organization in question at this stage of the  
Ombudsman's process will probably eliminate a number of  
cases wherein recommendations are denied. In the  
Committee's opinion, this case is one of those.

The Committee notes the assurance by the Vice Chairman of Appeals of The Workmen's Compensation Board that upon receipt from the Ombudsman's office of a written report from the doctor in question an Appeal Board Panel will be constituted immediately for reconsideration of this case pursuant to Section 75. If, by the time this report is tabled in the Legislature, the Board has in fact done this, then the Committee recommends that IT ADVISE IT AND THE OMBUDSMAN OF THE BOARD'S DECISION AS SOON AS IT IS RENDERED.<sup>(34)</sup>"

In accordance with Recommendation No. 32 of the Committee's Fifth Report, The Workmen's Compensation Board convened a hearing and rendered a decision dated the 18th of July, 1979 wherein it denied the complainant entitlement to the benefits in question. On the question of the application of the policy of benefit of the doubt the Board stated that:

"The Appeal Board has considered the application of the policy of benefit of the doubt in the circumstances of this case and has concluded on the basis of the medical opinion that the policy is not applicable."

In the Committee's opinion this decision and the conclusion referable to the policy of benefit of the doubt is premature. The Committee in its Fifth Report, recommended that the Board reformulate that policy to one which is more workable and understandable. The process of drafting as the Committee has discussed earlier in this Report, is still underway. Therefore, the Committee recommends that THE WORKMEN'S COMPENSATION BOARD RECONSIDER THIS CASE PURSUANT TO SECTION 75 WHEN THE CORPORATE BOARD HAS

FINALLY ADOPTED AND APPROVED THE POLICY OF BENEFIT OF THE DOUBT AS DISCUSSED WITH THE OMBUDSMAN AND THIS COMMITTEE.<sup>(16)</sup>

In making this recommendation the Committee does not intend to indicate whether the recommendation of the Ombudsman or the response of The Workmen's Compensation Board is to be preferred. The whole reason for The Workmen's Compensation Board in having conducted a re-hearing was to consider a written medical report obtained by the Ombudsman's office subsequent to the Committee's consideration of this matter to confirm a medical opinion attributed to a physician retained by the Ombudsman's office that it is:

"impossible to produce medical evidence stating that the complainant has no residual disability as a result of his compensable accident."

The Committee notes that the medical report obtained is less categorical in nature. The doctor stated in writing that:

"Since (the complainant) had no back symptomology whatsoever prior to his injury (although the spondylitis was undoubtedly present), one cannot be absolutely sure that the injury was not responsible in some way for making his spondylitis symptoms clinically evident."

(6) Detailed Summary #75, Ombudsman's Third Report

At pages 35 and 36 of the Committee's Fifth Report, it stated the following:

"Subsequent to the tabling of the Ombudsman's Third Report in the Legislature, The Workmen's Compensation Board by an Appeal Board interim decision dated the 20th

of July, 1978 appointed a medical referee pursuant to Section 22(1) of The Workmen's Compensation Act for the purpose of reporting to the Board on the diagnosis of the workman's complaints; the causal relation, if any, of any diagnosis to the complainant's employment and lastly, the complainant's fitness for employment.

The Committee was advised by representatives of the Ombudsman's office that they welcomed this action of the Board and that they recommended the Committee defer any further consideration of this complaint pending the report of the medical referee and subsequent actions of the Board, if any. The Committee accordingly agreed to defer any further consideration pending these events. However, the Committee recommends that THE WORKMEN'S COMPENSATION BOARD TAKE ALL APPROPRIATE ACTIONS IN CONSEQUENCE OF THE MEDICAL REFEREE'S REPORT FORTHWITH UPON RECEIPT THEREOF AND THAT THEREAFTER THE BOARD FORTHWITH REPORT ANY ACTIONS TAKEN IN CONSEQUENCE THEREOF TO THE OFFICE OF THE OMBUDSMAN.<sup>(15)</sup> The Committee further recommends that THE OMBUDSMAN, WITHIN A REASONABLE TIME AFTER HE HAS BEEN INFORMED OF THE BOARD'S ACTIONS SUBSEQUENT TO THE RECEIPT BY IT OF THE REFEREE'S REPORT, ADVISE THE COMMITTEE OF WHETHER, IN HIS JUDGMENT, THE SAID ACTIONS



ARE ADEQUATE AND APPROPRIATE WITHIN THE  
MEANING OF SECTION 22(4) OF THE OMBUDSMAN  
ACT.<sup>(16)</sup>"

The medical referee's report received by the Board in August 1978 was considered by it to be inconclusive. Accordingly, the Board directed a new hearing be held pursuant to Section 75 of The Workmen's Compensation Act to determine the claimant's entitlements to benefits. After reviewing the medical and other related history on the Board's file the Appeal Board Panel stated that:

"the Appeal Board is unable to conclude that (the complainant's) low back disability manifest from October, 1959 was causally related to the incident in employment on May 27, 1959."

Accordingly, the Appeal Board denied the complainant any further entitlement to benefits.

The Committee considered this case in detail for the purpose of deciding whether it could support the recommendation made by the Ombudsman in his report in this case pursuant to Section 22(3) of The Ombudsman Act.

The complainant claims benefits for injuries arising out of a fall in 1959 during the course of his employment. The accident was observed by a foreman. He reported the incident of falling but not any symptoms with respect thereto. Within a two-week period subsequent to the fall, he sought and obtained the assistance and treatment of a chiropractor. Within four months thereafter he was treated by an orthopedic specialist and ultimately operated on by a second orthopedic specialist in 1961. Since that time he has been under treatment by the latter specialist.

The Workmen's Compensation Board ultimately accepted that an accident occurred during the course of the complainant's employment but has never accepted that any causal relationship has existed between the accident and the symptoms for which the complainant contends.

The Ombudsman after completing his investigation of the Appeal Board decision dated May 13, 1974 formed the opinion that the available medical information establishes a relationship between the industrial accident and the ongoing back disability. He formed the opinion that the decision of the Appeal Board is not correct (or wrong) and that the complainant should be entitled to benefits for a permanent back disability. He accordingly recommended that the decision of The Workmen's Compensation Board be cancelled and that the complainant receive temporary total compensation benefits for the time he was off work, due to back disability in 1959, 1961, 1963, 1971 and 1973. He also recommended that the complainant be entitled to a permanent disability award for continuing back disability assessed retroactively to 1961.

The Workmen's Compensation Board has refused to implement the Ombudsman's recommendation primarily on the basis of its findings of credibility in respect to the complainant's evidence. That is, The Workmen's Compensation Board does not believe that the complainant experienced symptoms referable to his low back contemporaneous with the fall at work and does not believe his reasons for not reporting or seeking treatment for these symptoms within the four-month period immediately after the accident.

In this case the Committee is being required in effect to state a preference for the findings of credibility made by The Workmen's Compensation

Board and by the Ombudsman's office. The Workmen's Compensation Board on the one hand simply does not believe the complainant when he relates the symptoms complained of to the compensable injury. The Ombudsman's office obviously accepts the complainant's version and believes it is corroborated by other independent evidence available to The Workmen's Compensation Board.

It is virtually impossible for this Committee to state whose judgment in this matter is to be preferred. However, the Committee does not believe that a decision solely upon this issue of credibility will resolve the question of whether the symptoms complained of are directly related to the industrial accident.

Rather, the Committee is of the opinion that this is a case for consideration of the application of the policy of the benefit of the doubt at such time as that policy is finally approved by The Workmen's Compensation Board. There are a number of issues in this case wherein the policy might be considered for application. Even the medical referee's report which The Workmen's Compensation Board ruled as inconclusive contains an opinion which may be interpreted as relating the symptoms to the industrial accident. The referee noted in the report that:

"It seems that no one denies that there was an episode of injury but few would agree that it was the one and only factor in the production of his subsequent problems which necessitated multiple surgical procedures."

That statement can be taken to mean that although the symptoms were not 100% related to the injury they are in some proportion caused thereby. If that is the case and if the other prevailing medical evidence supports that view, then

notwithstanding the issue of credibility the policy of the benefit of the doubt would seem to be applicable in this case.

Accordingly, while the Committee is unable to accept the recommendation of the Ombudsman it nevertheless recommends that THE WORKMEN'S COMPENSATION BOARD WHEN THE POLICY OF BENEFIT OF THE DOUBT HAS BEEN APPROVED BY THE CORPORATE BOARD, RECONSIDER THIS CASE BY HEARING, PURSUANT TO SECTION 75 OF THE WORKMEN'S COMPENSATION ACT. AT THAT HEARING THE BOARD SHALL CONSIDER THE APPLICATION OF THE POLICY OF BENEFIT OF THE DOUBT TO THE ISSUES IN THIS CASE.<sup>(17)</sup>





SCHEDULE "A"

*Exhibit No. 2*  
*Dated July 23/79.*  
*Mr. Fedries -*  
*Clerk*

Ministry of the  
Attorney  
General

416/965-1664

18 King Street East  
Toronto Ontario  
M5C 1C5

July 4, 1979

Mr. Patrick D. Lawlor, Q.C.  
M.P.P.  
Chairman  
The Select Committee on the Ombudsman  
Room 415, North Wing  
Legislative Buildings  
Queen's Park  
Toronto, Ontario

Dear Pat:

I refer to the debate on the evening of June 21st on the Sixth Report of the Select Committee on the Ombudsman. We discussed the issues briefly after the debate and I indicated that I would set out my views to you in a letter.

I wish to repeat what I have said many many times that the Office of the Ombudsman is an extremely important office not only to the people of the Province but to the Government and the Legislature. As well, I am fully convinced that despite some of the frustrations felt by members of the Select Committee and the recommendations made by the Committee are tremendously important.

The work of the Select Committee and the resulting debate on the issues will, I believe, have an accumulative effect for positive good. I do not feel that we should become discouraged with the process to date when we realize that this is still a relatively new field of procedure. The debate went a long way to highlight the importance of the issues and the problems faced in wrestling with the best way to implement recommendations of the Ombudsman and the Select Committee.

I believe that the Workmen's Compensation Board will seriously consider the recommendations of the Select Committee knowing that they have been agreed to by resolution of the House. I suggest that there should be time to assess the ultimate results before we rush into legislation to change the present procedures. If the present procedures are felt by the House to be insufficient, then we should attempt to find procedures which will best serve the public interest.

At page 14 of the Report, the Select Committee states, "The Committee is concerned less the opinion of the Attorney General be taken by the Workmen's Compensation Board and, in fact, by other governmental organizations as a statement that a recommendation of a Select Committee of the Legislature may be disregarded for any reason".

With respect, I do not believe that statement to reflect the thrust of my opinion. In my opinion of March 15th, I stated, "The recommendations of the Committee must be implemented by legislation or by the Board itself". In other words, I am not saying that recommendations may be disregarded for any reason but that to be legally effective, must be either implemented by legislation or by the Board itself.

The Report at page 13 states, "However, if a recommendation of the Select Committee is adopted by the Legislature pursuant to an appropriate motion, then that recommendation becomes an act of the Legislature. Failure of the Workmen's Compensation Board to carry out the will of the Legislature carries the possible consequences as set out in The Legislative Assembly Act".

It is my view that a resolution of the Legislature only binds in matters relating to procedures of the House and its committees and a resolution cannot have any legally binding effect on substantive matters which are outside the purview of parliamentary procedures.

Erskine May Parliamentary Practice, 19th Ed., at page 382, reads, "By its orders, the House directs its Committees, its members, its officers, the order of its own proceedings and the acts of all persons whom they concern; by its resolutions the House declares its own opinions and purposes". The indication seems to be that a resolution is a statement of opinion, rather than a legally binding pronouncement. This indicates that concerning matters involving the internal operations of the Legislature, a legislative enactment by the Legislature is unnecessary; but that matters involving persons and entities beyond the internal operation of the Legislature involved, for their effectuation, legislation.

The Legislature can effect matters outside its own internal operations only by appropriate legislative action.

The following comments appear at page 406-408 in A. V. Dicey, The Law of the Constitution, 10th ed., 1964:

".... The commands of Parliament (consisting as it does of the Queen, the House of Lords and the House of Commons) can be uttered only through the combined action of its three constituent parts and must, therefore, always take the shape of formal and deliberate legislation. The will of Parliament can be expressed only through an Act of Parliament. .... The principle that Parliament speaks only through an Act of Parliament greatly increases the authority of judges. A Bill which has passed into a statute immediately becomes subject to judicial interpretation, and the English Bench have always refused, in principle at least, to interpret an Act of Parliament otherwise than by reference to the words of the enactment. An English judge will take no notice of the resolutions of either House ....".

At pages 663-664 of May under the heading "Government Replies to Reports", the Government usually, in response to a Select Committee Report, replies by memorandum or Command Paper, the latter being a Paper presented to Parliament at the Command of the Crown. There is no indication here that the Government is automatically legally obliged to implement the Select Committee's recommendations.

At page 664-665 of May under the heading "Consideration of Reports of Select Committees", the indication is that it takes more than debate and adoption on a Select Committee Report by the House in order for the Report's recommendations to be legally binding. There is no indication that adoption, per se, renders the recommendations legally binding. On page 665, there is reference to footnote (g) in reference to enforcement of the resolutions of the Committee, but a perusal of the Commons Journals listed in the footnote reveals that the resolutions dealt with internal parliamentary procedures.

With reference to the Select Committee statement, "Failure of the Workmen's Compensation Board to carry out the will of the Legislature carries the possible consequences as set out in The Legislative Assembly Act", I suggest that the only provision that appears to deal with punishing, as breaches of privilege or as contempts, would be section 45 which lists the jurisdiction of the Assembly in such matters. Failure to comply with an adopted recommendation passed by resolution of the House would not seem to fit into any of the situations enunciated in section 45.



It would appear to me that before any resolution of the House would be legally binding on persons outside the general internal procedures of Parliament, a Bill would have to be introduced and passed by the House indicating that a resolution of the House would be legally binding. I suggest that a great deal of thought must be given to such an innovative move since I am not aware that any Parliament has ever given such legally binding effect to its resolutions.

It should be remembered and perhaps underlined that the Legislature has pursuant to sections 74 and 75 of The Workmen's Compensation Act, given the Workmen's Compensation Board exclusive jurisdiction to decide matters within its jurisdiction in its discretion and to reconsider any of its orders or decisions. I would want to give a great deal of serious and meditative thought to any piece of legislation which would interfere with the discretion given to a tribunal to decide issues when that tribunal holds a hearing with all interested parties present and then to the best of its ability renders a decision which has a subsequent appeal procedure.

I would appreciate any thoughts you have on my views and I would be willing to discuss the issues with you at any time.

Yours very truly,

R. Roy McMurtry  
Attorney General



SCHEDULE "B"

June 25, 1979

S. W. Martin, Esq.,  
Chairman,  
Ontario Council of Health,  
14th Floor,  
700 Bay Street,  
Toronto, Ontario.

M5G 1N2

Dear Mr. Martin:

As you know, sections 43 to 50 of The Public Hospitals Act set out the statutory system for appointment of physicians to hospital medical staffs. Amongst the essential elements of this system are:

- (1) physicians are appointed to a hospital medical staff by the Board of Directors of the hospital (section 43);
- (2) every physician is entitled to apply for appointment or reappointment; (section 44(1));
- (3) each application is reviewed by the medical advisory committee of the hospital, which makes a recommendation in writing to the Board of Directors, and gives written notice thereof to the applicant (section 44(6));
- (4) the applicant may require a hearing before the Board of Directors (section 44(7));
- (5) any applicant who considers himself aggrieved by a decision of the Board of Directors not to appoint or not to reappoint him to the medical staff is entitled to a hearing by the Hospital Appeal Board (section 48(1));

S. W. Martin, Esq.

June 25, 1979

- (6) the Hospital Appeal Board may confirm the decision of the Board of Directors or may direct the Board to take other action (section 48(5));
- (7) any party to proceedings before the Hospital Appeal Board may appeal from its decision to the Supreme Court of Ontario (section 50).

I wish to know what systems of public hospital medical staff appointments prevail in the other provinces.

In particular, I would ask you to ascertain and inform me as to:

- (1) what rights of physicians to appointment or reappointment are prescribed in the applicable legislation;
- (2) who has power to appoint physicians to the public hospital medical staffs;
- (3) what limitations, if any, are spelled out in the applicable legislation on the power of appointment;
- (4) the role, if any, prescribed by the legislation for medical advisory committees or analogous bodies;
- (5) the rights to review or appeal of a refusal of appointment or reappointment, by any tribunal (including a court of law), and the powers of the tribunal;
- (6) the composition of any such tribunal which is not a court;
- (7) where the review tribunal is not a court, any right of appeal from the decision of the tribunal to a court.

Kindest regards,

Yours sincerely,

Dennis R. Timbrell,  
Minister of Health.

*C. H. Reed*

SCHEDULE "C"



**The Workmen's Compensation Board**

2 Bloor Street East, Toronto, Ontario M4W 3C3

Telephone (416) 595-6860

Michael Starr  
Chairman

June 26, 1979.

The Honourable Robt. G. Elgie, M.D.,  
Minister of Labour,  
400 University Avenue,  
14th Floor,  
Toronto, Ontario,  
M7A 1T7.

Dear Doctor Elgie:

The Board has now received the Votes and Proceedings of the Legislative Assembly of the Province of Ontario for the 3rd Session of the 31st Parliament, Thursday, June 21st, 1979. The Board has noted that the House has considered the recommendations contained in the Sixth Report of the Select Committee on the Ombudsman and has ordered that the report be received and adopted. As you are aware, items 2 to 9 inclusive relate directly to the operations of the Board.

In view of the opinion expressed by the Attorney General in his letter of March 15, 1979, that the recommendations of the Committee must be implemented by legislation or by the Board itself and that the Board may determine that it should not comply with the recommendation of the Committee, the Board feels that specific direction from yourself and the Government is now required in view of the fact that the House has received and adopted the report of the Committee.

The Attorney General has also stated that if the Board intends to give effect to a recommendation of the Committee in respect of a particular decision, the Board must reconsider its original decision under the Workmen's Compensation Act. Presumably this will be done under Section 75 of the Act and the rules of natural justice will apply. In this respect, any parties affected should be given the opportunity to make representations.

The Select Committee on the Ombudsman is scheduled to reconvene in July and will probably be requesting that the Board advise as to what action has been taken with respect to its recommendations. In view of this, there is some urgency in receiving direction.

Yours sincerely,

SCHEDULE "D"

- "1) The cases disputed in the Minister of Housing's reply of August 31st, 1976 and any other cases where the negotiations were handled by one of the five Applicants to the Motion presently before the Divisional Court will immediately have their cases dealt with by a Commission consisting of some members of The Land Compensation Board, Judicial, and/or Senior legal persons.

This Commission is to be set up by Order-in-Council under The Public Inquiries Act, 1971 so as to avoid any delay which might result if the matters were to go directly to The Land Compensation Board and the enabling legislation that might be required.

The Commission so appointed will be empowered to consider in the first instance the overall merits of the claims for additional compensation of the former landowners. In making this determination the Commission shall be empowered to take into account all the circumstances of each particular case, including but without limitation, any misleading statements, inadequate appraisals, or misunderstandings based upon reasonable grounds in the circumstances of the particular case.

The Commission shall determine what allegations of misconduct are made against the five Applicants to the Motion presently before the Divisional Court in the Report of the Ombudsman and whether they are justified.



Secondly, the Commission shall be further empowered to determine the amount of additional compensation to be paid to the former landowners in the cases where entitlement has been established. In making this determination, the Commission shall take into account any benefits or profits derived from the use made of the compensation paid on the original sale.

- 2) The balance of the 44 cases named in the Ombudsman's Report and additional complaints lodged with the Ombudsman relating to the North Pickering Project totalling approximately 55 to date, will be dealt with in the following manner:

The Ombudsman will reopen the investigation into the merits of the balance of the 44 cases. In all of these cases and any new cases coming before the Ombudsman, the Ombudsman will conduct a hearing pursuant to Section 20(2) of The Ombudsman Act, 1975.

The Minister of Housing has undertaken to accept the Ombudsman's recommendation in relation to the aforementioned cases and, where appropriate, to refer immediately any such cases to The Land Compensation Board. The Land Compensation Board in dealing with these cases, shall only determine the amount of compensation to be given, taking into consideration any benefits or profits actually derived from the use made of the compensation paid on the original sale.

In view of the fact that under this solution the merits of all of the cases will be determined by proceedings of an adversarial nature, it is understood that the Motion presently before the Divisional Court will be discontinued by the Applicants.

John Sopinka, Q.C., on behalf of the five Applicants to the Motion presently before the Divisional Court was consulted by the Ombudsman and the Minister of Housing in this regard and concurs on behalf of his clients.

It is agreed that the former landowners and present and former agents and officials of the Ministry of Housing will be entitled to be represented by counsel and it is further agreed that the reasonable costs of such counsel will be borne by the Ministry of Housing as will the costs of any appraisals required. Counsel for the former landowners will be appointed by the Ombudsman.

The Select Committee endorses the agreement between the Ombudsman and the Minister of Housing and urges that it be implemented forthwith and will so report to the House. Apart from preparing this formal report to the House, the proceedings of this Committee on the Ombudsman's Report on the North Pickering Project are concluded."



the

Ministry  
of  
Housing

SCHEDULE "E"

Hearst Block  
Queen's Park  
Toronto Ontario  
M7A 2K5  
416/965-6456

June 23, 1978

Mr. A. Maloney, Q.C.  
The Ombudsman/Ontario  
Suite 600  
65 Queen Street West  
Toronto, Ontario

Dear Mr. Maloney:

The receipt of your letter of April 13, 1978, advising of your intention to make an application under Section 15 of The Ombudsman's Act, and the more recent action of Mr. J. Sopinka and his clients in withdrawing from the hearings before Mr. Hoilett, has led me to review the state of the North Pickering hearings. The following is my assessment of the situation and the conclusions I have reached.

The agreement that led to the setting up of the Donnelly Commission and the Hoilett hearings was the result of a number of compromises of the positions previously taken by yourself, the Minister of Housing and John Sopinka. As I understand it, the positions taken immediately prior to the agreement were as follows.

The Honourable John Rhodes had challenged your original report and had suggested that an independent review of the claims of the former owners and of the allegations in respect of the public servants was required.

You, for your part, were strongly of the view that an independent review of your findings was not required or appropriate.

Mr. Sopinka, on behalf of his clients, had applied to the courts to set aside your report as it affected his clients. Basically, he attacked your report on the grounds that you had not provided his clients with a fair opportunity to know the allegations being made about them or to reply to them, contrary to Section 19(3) of The Ombudsman's Act.

(continued)



Mr. A. Maloney

The compromise reached was as follows. The Minister of Housing agreed that certain of the cases would be reviewed by your office and the recommendations made as a result of this review would be accepted without question. You agreed that certain cases would be reviewed by an independent tribunal, which would determine all aspects of the claims of such former owners. Mr. Sopinka agreed to discontinue his application before the courts on the understanding that hearings of an adversarial nature would be used to review the allegations against his clients.

Insofar as the effect of your compromise is concerned, the actions of Mr. Scott in withdrawing from the Donnelly hearings coupled with your apparent failure to urge the owners to continue before the Commission has resulted in none of the cases that were referred to the Commission being heard on their merits or otherwise. You now suggest you will seek the courts confirmation of your right to re-open the cases that were to be heard by the Donnelly Commission. You have, therefore, been put or are seeking to be put in a position where those aspects of the agreement requiring compromise on your part have been or will be totally negated.

Mr. Sopinka, although proceeding with the Donnelly Commission hearings even after Mr. Scott had withdrawn, appears now to have concluded that his experience before Mr. Hoilett and your actions in denouncing the Donnelly Commission report indicates such a strong bias on the part of your office that he cannot expect a fair report out of the Hoilett hearings. He has therefore withdrawn from the Hoilett hearings and in so doing has withdrawn from the agreement as effectively as you have.

The result of these two courses of actions by yourself and Mr. Sopinka, is to leave only the Ministry of Housing subject to the terms of the original compromise. I do not believe this to be either an equitable or an acceptable position for the Ministry to be in having regard for the matters in issue.

Throughout these two hearings, the Ministry has attempted to respond to the inevitable controversial issues that arose from time to time in a manner that was consistent with our responsibility to ensure that the public interest was served. As you are aware, the Ministry took a position in respect of all of the objections of Mr. Scott concerning the procedures before the Donnelly Commission which would have resolved those issues to Mr. Scott's satisfaction.



Mr. A. Maloney

The one issue on which we did not make a further compromise was in respect of the appointment of Mr. Donnelly to head up the Commission. It was on this point, and I would suggest, on this point alone that Mr. Scott withdrew from the hearings.

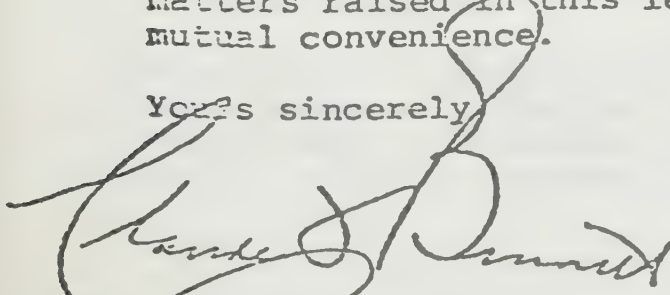
In respect of the Hoilett hearings, you will no doubt recall that the Honourable John Rhodes raised with you last fall, his concern about the manner in which Mr. Hoilett was conducting the hearings. You did not consider this point worth pursuing at that time. Now, this problem coupled with your very strong statements about the Donnelly Commission has created an atmosphere in which it is not difficult to understand the concern the property agents have over the nature of the report that would eventually come out of your office.

Faced with these most unfortunate developments, I have spent some time in looking for a position that would avoid wasting the public monies expended on the extremely long and expensive proceedings that have taken place to date; for, notwithstanding the misgivings that have been expressed about the Hoilett hearings, I believe that they can still provide me with a basis for dealing fairly with the claims of the former landowners. I also believe that I can make constructive use of the proceedings to date without placing anyone at an unfair disadvantage.

I have concluded that the Ministry should continue to participate in the Hoilett hearings. However, I cannot continue to be bound by the compromise made by the Honourable John Rhodes that the findings of your office arising out of the Hoilett hearings will be accepted without question. Upon receipt of whatever reports are made by your office as a result of the Hoilett hearings, I will treat them as I would any other report from your office, which is to say they will be carefully reviewed and where I can in good conscience support the findings of your office, I will do so. If, however, I conclude that such findings are not supportable, I will take such other action as I determine to be appropriate, having regard for my responsibilities as Minister of Housing.

I would be pleased to meet with you to discuss the matters raised in this letter in more detail at our mutual convenience.

Yours sincerely,



Claude F. Bennett  
Minister



- 100 -

SCHEDULE "F"

*Received 11/10/78  
Filed July 30, 1979.  
A.M. Geddis  
Clerk*

Deputy Minister

Ministry  
of  
Health

Hepburn Block  
Queen's Park  
Toronto, Ontario  
M7A 1R3  
416/965-2437

November 21, 1978

Mr. Keith A. Hoilett  
Temporary Ombudsman  
Suite 600  
65 Queen Street West  
Toronto, Ontario  
M5H 2M5

RECEIVED

NOV 22 1978

RE: Your file

Your file

OFFICE OF THE  
OMBUDSMAN - ONTARIO

Dear Mr. Hoilett:

My response to your "Possible Recommendation" as outlined in your letter of October 26, 1978 is as follows.

The Health Insurance Amendment Act provides that "where the amount payable by the Plan for an insured service rendered by a physician is not prescribed by the regulations it is the function of the General Manager and he has the power to determine the amount".

As you are no doubt aware there is a wide discrepancy in fees submitted by physicians from the United States. There must be some discretion allowed for on the part of the General Manager, as proposed in the Health Amendment Act to ensure the fair and reasonable use of the Plan.

As I mentioned in my August 17, 1978 letter to you, there are very few medically necessary services or procedures which are not performed in the province of Ontario. In those few instances in which a service

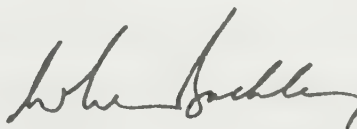
Mr. Keith A. Hoilett  
November 21, 1978  
Page 2

is unavailable in this province, the General Manager checks with the Ontario Medical Association requesting the advice on an appropriate fee. The amount suggested is then used to reimburse the patient. The United States do not have a common fee schedule as is used in Ontario and the charge are often quite out of line with Ontario rates for comparable services.

In short, I do not agree that the recommendation being considered would improve the current system and that it is just as "unreasonable, unjust, oppressive or improperly discriminatory" as the present system.

Thank you for this opportunity of expressing the Ministry of Health's views on the possible conclusion and recommendation before you came to a final conclusion. I would appreciate being kept informed.

Yours sincerely,



W. Alan Backley,  
Deputy Minister

SCHEDULE "G"

SUMMARY OF RECOMMENDATIONS  
CONTAINED IN THIS REPORT

PART A      RECOMMENDATIONS WHICH SUPPORT RECOMMENDATIONS OF  
THE OMBUDSMAN MADE TO GOVERNMENTAL ORGANIZATIONS  
PURSUANT TO SECTION 22(3) OF THE OMBUDSMAN ACT

11.            The Committee supports the substance of the Ombudsman's recommendation and recommends to the Legislature for approval and adoption that the Ministry of Health cause an amendment to be made to The Health Insurance Act providing that:

"where the amount payable by the Plan for an insured service rendered by a physician is not prescribed by the regulations, it is the function of the General Manager and he has the power to determine the amount.". (Page 62)

12.            The Workmen's Compensation Board revoke its decision of December 30, 1976 and grant the complainant a permanent partial disability pension for the disability referable to his lower back caused by the compensable accident in October, 1958. (Page 66)

PART B      GENERAL RECOMMENDATIONS

1.            The Committee recommends that its order of reference be amended to include a provision whereby it is permitted to sit concurrently with the



Legislature to consider from time to time, interim reports tabled by the Ombudsman in the Legislature. (Page 23)

2. The Committee recommends that the last paragraph of the policy of benefit of the doubt of The Workmen's Compensation Board be deleted and the following substituted therefor:

"When applied to an injured employee, the effect is that the employee does not require a preponderance of evidence in support of his claim. Rather, where there is doubt on any issue, and the disputed possibilities are approximately equal in weight, then the issue will be resolved in favour of the employee. On the other hand, speculation will not suffice." (Page 29)

3. The Ombudsman shall, no later than three months after the end of his reporting period, table his Annual or Semi-Annual Report, as the case may be, with the Speaker of the Legislative Assembly. (Pages 31-32)

4. A member of the Ombudsman's staff carrying out Ombudsman functions under The Ombudsman Act, shall not express to anyone, other than to the Ombudsman or to his authorized delegate, his or her opinion, recommendation or other similar comments respecting the decision, recommendation, act or omission purported to have been committed by or on behalf of the governmental organization in question or respecting anything else arising out of the investigation of the complaint by the Ombudsman and his staff. (Page 32)

5. Preliminary investigations by the Ombudsman's office shall be limited to cases wherein further information is required by the Ombudsman or any member of his staff either to confirm a complaint or wherein immediate assistance of a complainant is required and the circumstances of the complaint make the immediate implementation of the procedural requirements of The Ombudsman Act impossible. Once the substance of the complaint has been confirmed by the Ombudsman or his staff or where the immediate disposition of the complaint is neither possible nor advisable, the requirements of The Ombudsman Act must be followed. (Pages 32-33)

6. Where at any time during the course of an investigation it appears to the Ombudsman that there may be sufficient grounds for formulating opinions under Section 22(1) and (2) of The Ombudsman Act or of making any recommendations pursuant to Section 22(3) of The Ombudsman Act, which has the effect of altering, opposing or causing the original decision, recommendation, act or omission to be changed in any way, the Ombudsman shall give the governmental organization and any person who is identified or is capable of being identified as having made or committed or caused to be made or committed, as the case may be, the decision, recommendation, act or omission, an opportunity to make representations respecting the adverse report or recommendations either personally or by counsel. (Pages 34-35)

7. All reports of the Ombudsman made to governmental organizations in accordance with Section 22 of The Ombudsman Act shall contain opinions in the wording of Section 22(1) and recommendations within the wording of Section 22(3). (Page 35)

8. In all cases where the Ombudsman has concluded that a response by a governmental organization to a report made by him pursuant to Section 22(3) of the Act is neither adequate nor appropriate, and where he wishes ultimately, if the matter cannot be resolved, to seek support for his recommendation in the Legislature, the report under Section 22(3) shall be referred to the Premier before it is referred to the Legislature. (Page 35)

9. It recommends, therefore, that when Section 12(11) of the Family Benefits Act is amended, it contain the substance of the Committee's recommendation which is:

"The Board of Review may, on application of any party or on its own motion and with or without a hearing, reconsider and vary any decision made by it and if the Board hears from the parties to the proceedings in which the original decision was made, the provisions of this section, except subsection (4), apply mutatis mutandis to the proceedings on such reconsideration."

As well, the amendment should contain the substance of concerns expressed by the Minister that all persons affected by the decision of the Board of Review be given an opportunity to make representations and a reasonable time limit for board rehearings be stipulated. (Page 44)

10. The Financial Administration Act be amended to provide that when the Ombudsman, after all necessary and appropriate requirements of The Ombudsman Act have been adhered to, makes a recommendation to a governmental organization for the payment of a sum of money, in the absence of any other express legal authority, and when the recommendation is entirely accepted by the governmental organization, a "lawful authority" is created for such money

to be paid by the governmental organization out of the Consolidated Revenue Fund upon recommendation to the Treasurer for payment of such money by the Minister responsible for the governmental organization. (Pages 50-51)

13. The Workmen's Compensation Board reconsider, by hearing, its decision of December 15, 1971. In that hearing the Board should at least hear fresh evidence respecting the relationship between the complainant's symptoms and the compensable accident both from the medical referee appointed in 1971 and the psychiatrist retained by the Ombudsman during the course of his investigation. (Pages 70-71)

14. The Workmen's Compensation Board reconsider, by hearing, this matter pursuant to Section 75 of The Workmen's Compensation Act to determine the extent to which total benefits paid to this complainant should be increased. (Page 74)

15. For the purpose of the hearing, The Workmen's Compensation Board arrange for the complainant to be examined by its consulting psychiatrist who originally examined the complainant in May of 1975 and that the psychiatrist be required to express an opinion specifically as to what proportion of the psychiatric disability suffered by the complainant is attributable to the organic liver dysfunction. (Pages 74-75)

16. The Workmen's Compensation Board reconsider this case pursuant to Section 75 when the Corporate Board has finally adopted and approved the policy of benefit of the doubt as discussed with the Ombudsman and this Committee. (Pages 80-81)



17.           The Workmen's Compensation Board when the policy of benefit of the doubt has been approved by the Corporate Board, reconsider this case by hearing, pursuant to Section 75 of The Workmen's Compensation Act. As that hearing the Board shall consider the application of the policy of benefit of the doubt to the issues in this case. (Page 86)









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# **EIGHTH REPORT OF THE SELECT COMMITTEE ON THE OMBUDSMAN**

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**1980**

**TABLED IN THE LEGISLATIVE ASSEMBLY BY  
THE CHAIRMAN OF THE COMMITTEE  
PATRICK D. LAWLOR, Q.C., M.P.P.**

4th Session 31st Legislature  
29 Elizabeth II



December 9, 1980

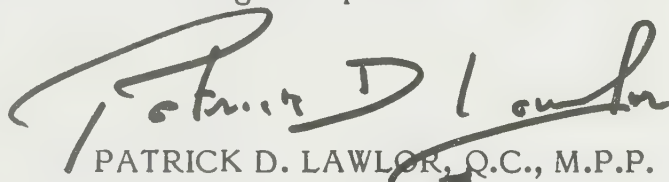
TO:

THE HONOURABLE JOHN E. STOKES  
Speaker of the Legislative Assembly  
of the Province of Ontario

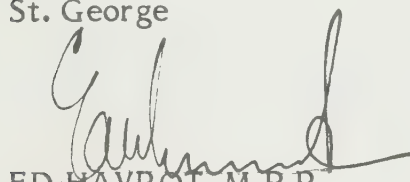
DEPOSITED UNDER ACT 101

Sir,


We, the undersigned members of the Committee appointed by the Legislative Assembly of the Province of Ontario on Tuesday, July 12, 1977, have the honour to submit the attached eighth report.


  
PATRICK D. LAWLOR, Q.C., M.P.P.  
Lakeshore  
Chairman

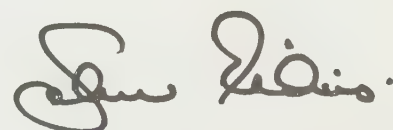
  
MARGARET CAMPBELL, Q.C., M.P.P.  
St. George

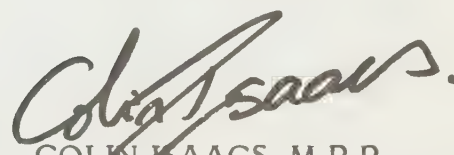
  
ED HAVROT, M.P.P.  
Timiskaming

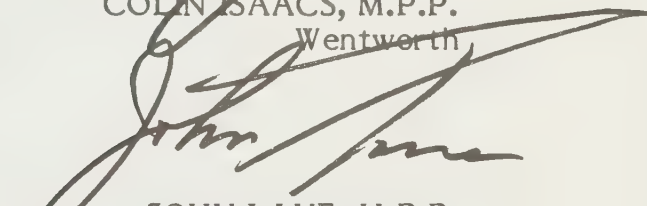
  
ROSS McCLELLAN, M.P.P.  
Bellwoods


  
JAMES TAYLOR, Q.C., M.P.P.  
Prince Edward-Lennox

  
OSIE F. VILLENEUVE, M.P.P.  
Stormont-Dundas-Glengarry

  
JOHN EAKINS, M.P.P.  
Victoria-Haliburton

  
COLIN ISAACS, M.P.P.  
Wentworth

  
JOHN LANE, M.P.P.  
Algoma-Manitoulin

  
GORDON I. MILLER, M.P.P.  
Haldimand-Norfolk





MEMBERS OF SELECT COMMITTEE  
ON THE  
OMBUDSMAN

PATRICK D. LAWLOR, Q.C., M.P.P.	Lakeshore
MARGARET CAMPBELL, Q.C., M.P.P.	St. George
JOHN EAKINS, M.P.P.	Victoria-Haliburton
ED HAVROT, M.P.P.	Timiskaming
COLIN ISAACS, M.P.P.	Wentworth
ROSS McCLELLAN, M.P.P.	Bellwoods
JOHN LANE, M.P.P.	Algoma-Manitoulin
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OSIE F. VILLENEUVE, M.P.P.	Stormont-Dundas-Glengarry

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JOHN P. BELL

Counsel to the Committee

GRAHAM WHITE

Clerk of the Committee



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## INTRODUCTION

On the 22nd day of May, 1980, the Ombudsman presented his Seventh Report to the Speaker of the Legislative Assembly. The Committee considered this Report and other outstanding matters during the weeks of June 30th and July 7th, 1980. During that period it heard from 24 witnesses and received exhibits.

On the 11th day of October, 1979, the Seventh Report of the Select Committee on the Ombudsman was tabled in the Legislative Assembly by its Chairman, Patrick D. Lawlor, Q.C. On the 22nd day of November, 1979 the Committee's Report on motion by Government House Leader, The Honourable Thomas Wells, was considered by the Committee of the Whole House. The Legislative Assembly then received and considered the Report of the Committee of the Whole House which Report concurred in the 17 recommendations contained in the Committee's Seventh Report. Thereupon the Legislature ordered that the Seventh Report of the Select Committee be received and adopted.

This process further entrenched the commitment of the Legislative Assembly of the Province of Ontario and this Select Committee to the Ombudsman and the functions which he and the office perform for the people of the Province of Ontario. Against the background of that commitment the Committee reminds everyone of the following as expressed in the Seventh Report:

"This Committee is now confident that a procedure has been attained whereby the Ombudsman can attempt to invoke his "ultimate sanction" in such situations wherein a governmental organization has neglected or refused to implement a recommendation made by him in one of his reports. As will be discussed later in this Report (See pages 1 to 9), there is some disagreement among members of the Legislative Assembly as to the legal force and effect of an Order of the Legislative Assembly adopting one of this Committee's reports.

The weight in law that an Order of the Legislature adopting a Select Committee's report and recommendation is, in the Committee's opinion, not the critical issue in this discussion. That critical issue is best expressed by the Attorney General in a letter to the Chairman of this Committee dated July 4th, 1979 as to what is "the best way to implement recommendations of the Ombudsman and the Select Committee.". Certainly the discussion should not be centered upon the possible consequences of a failure or refusal to implement such recommendations, but upon the "best way" that the governmental organizations affected thereby are to implement those recommendations.

The Committee hopes that any governmental organization affected by such a recommendation adopted, by the Legislature, would be loathe not to implement that recommendation as quickly as possible. If that were not the case it would have a serious undermining effect on the integrity of the Legislature and the respect which all governmental organizations must have therefor. Certainly any governmental organization who embarks upon a technical "word game" with respect to the legal effect of the legislative action is demonstrating a profound disrespect for both the concept of the Ombudsman in the Province of Ontario and the Legislative Assembly."

In general terms, governmental organizations which have been affected by recommendations of this Committee, adopted by Order of the Legislative Assembly have complied with those recommendations without debate on the nature and extent of their legal obligation so to do. Such compliance is the only way that the Ombudsman in Ontario can meaningfully serve the people. If every recommendation issued by this Committee and adopted by Order of the Legislative Assembly was subjected to a legal debate on the legal obligation of the governmental organization to comply, the entire process would grind to a halt and the office of the Ombudsman would not be viewed as an institution created for the ultimate benefit of the people of Ontario.

The Committee recognizes that there will be occasions when a governmental organization will continue to disagree with the substance of an Ombudsman report and recommendation, which the Legislative Assembly has by Order approved and adopted with the assistance of this Committee. Where those occasions arise the

Committee urges the governmental organizations affected to comply with the Committee's recommendation expeditiously as they would any other legal obligation. To do otherwise will be to cause unnecessary strain on the entire process involving the Ombudsman, this Committee and the Legislative Assembly. To do otherwise would undermine the work of the Legislative Assembly and the democratic process represented thereby.

These occasions when they arise, represent the reality of the Ombudsman process in the Province of Ontario. This reality deserves continued support by all those affected thereby - by the Committee, in fulfilling its terms of reference as particularly expressed in the introduction of its Seventh Report; by the Legislative Assembly of the Province of Ontario in giving the Select Committee's reports full and serious consideration and debate and ultimate adoption by Order; and by the governmental organizations in question which must recognize that once the Legislative Assembly has "spoken" in the form of an Order adopting a report of the Select Committee, they must immediately as the circumstances permit comply therewith without further question.

The Seventh Report of the Ombudsman represents, in the Committee's opinion, the beginning of a new phase for the Ombudsman and his office. This is the first report made to the Legislative Assembly on a twelve month period of operation. It represents a consolidation of many items referenced in previous Ombudsman reports. It reports relevant issues with clarity and a conciseness which has permitted a clearer understanding of the work of the Ombudsman. It has also made this Committee's job easier to perform.

It is not coincidental that the changes noted in the Ombudsman's Report can also be found in the organization and operation of the Ombudsman's office. The



Committee has observed a general "tightning up" of operations and an increased awareness of his staff at all levels of the very important functions which they are assisting the Ombudsman to fulfil.

The Committee is not suggesting that the Ombudsman's office is without problems. There is still the concern over the length of time required to process complaints, particularly in the area involving the Workmen's Compensation Board. Such matters will require an intense amount of effort and dedication by all concerned to provide and maintain a level of service to which the people of Ontario are entitled. The Committee is optimistic that the Ombudsman and his office can meet the challenges ahead. The Ombudsman is assured of the continued support and assistance of this Committee as he meets those challenges.

The Committee wishes to commend the governmental organizations which have recently appeared before it or have otherwise assisted it for the purpose of responding to various matters contained in the Ombudsman's Seventh Report. In general terms the governmental organizations have demonstrated a sincere respect and support for the office of the Ombudsman and this Committee. That is so whether the governmental organization has agreed or disagreed with the Ombudsman or the Committee on any particular matter.

The Committee commends all such governmental organization for their efforts towards a working relationship with the Ombudsman and this Committee which ultimately will best serve those for whom the office of the Ombudsman was created - the people of the Province of Ontario. The Committee looks forward to further expanding and approving these working relationships.

On the 29th of May, 1980 the Legislative Assembly of the Province of Ontario adopted by Resolution the following motion by Mr. James Renwick, Q.C., M.P.P.



"That this assembly request the select committee on the Ombudsman to consult with the United Nations Commission on Human Rights, Amnesty International and the International Commission of Jurists and others, if advisable, with a view to reporting to this assembly may act to make its voice heard against political killings, imprisonment, terror and torture."

This represents a departure from the usual function which the Assembly has asked this Committee to perform. Strictly speaking it does not involve the Ombudsman or his office in any way.

The Committee has already met with key representatives of the three organizations mentioned in the Resolution. It will meet in the very near future with key representatives of other organizations in Canada who are committed to the letter and spirit of the Resolution.

The Committee has reported in more detail on its work to date in Part I of this Report. However, the Committee intends early in the new year to issue a special report to the Legislative Assembly with recommendations that it considers most appropriate to the issues raised by the Resolution.

The Committee wishes to advise that what is emerging from its consideration of these issues is a sense that something of a continuous and permanent nature is required of this Assembly to give effect to the concerns expressed by those who participated in the debate on May 29, 1980. The special report will focus on the form which in the Committee's opinion, will best serve the need.



**PART I**  
**RESOLUTION OF THE HOUSE**  
**DATED MAY 29TH, 1980**

On the 29th of May, 1980 the Legislative Assembly passed by Resolution the motion of Mr. James Renwick, Q.C., M.P.P.:

"That this assembly request the select committee on the Ombudsman to consult with the United Nations Commission on Human Rights, Amnesty International and the International Commission of Jurists and others, if advisable, with a view to reporting to this assembly on ways in which this assembly may act to make its voice heard against political killings, imprisonment, terror and torture."

During the month of September the Committee met with Canadian senior representatives of the three groups referred to in the resolution. Those discussions were elevating, illuminating, and in some instances quite moving. Without exception those who appeared supported the spirit and substance of the Resolution and urged the Committee to consider for recommendation to the Assembly specific steps which could be undertaken by the Legislative Assembly to ensure that the needs and concerns inherent in the Resolution can be addressed on a continuous and permanent basis.

The specific suggestions made by the groups of course vary to reflect their particular backgrounds and interests. They all, however, expressed a common theme: that this Legislative Assembly has a right and a duty as a "citizen in the world community" to take appropriate action; to make appropriate statements and to give appropriate support wherever in the world "political killings, imprisonment, terror and torture" occur.

The Committee, early in the new year, hopes to meet with the following:  
Canadian Council of Churches

Canadian Branch, International Red Cross

Canadian Civil Liberties Association

Professor W.S. Tarnopolsky

Ontario Human Rights Commission

Commonwealth Parliamentary Association

Interparliamentary Union

To provide the Legislative Assembly with any report with recommendations which will be meaningful and truly of assistance to it requires input and advice from more than the three referenced in the resolution. The Committee believes that the product of all its discussions will be truly representative of the feelings and concerns held by the people of Canada and the province of Ontario on the vital issues raised by the resolution.

At this stage, however, the Committee has already formulated an opinion that the Legislative Assembly can and should take steps to give the expressions of concern as articulated in the Resolution a permanent and continuous ability to be expressed. The form that this should take has not yet been fully discussed or decided. The Committee's special report in the spring will deal specifically with the nature and extent of the actions which the Committee decides the Legislative Assembly should take to "make its voice heard" against the action in question.



## PART II

### SEVENTH REPORT OF THE SELECT COMMITTEE

#### A. RESPONSES FROM GOVERNMENTAL ORGANIZATIONS TO RECOMMENDATIONS CONTAINED IN THE SELECT COMMITTEE'S FIFTH, SIXTH AND SEVENTH REPORTS

##### 1. WORKMEN'S COMPENSATION BOARD

- (i) Complaint #60, Ombudsman's Fifth Report, Apr. 78 - Sept. 78  
Recommendation #8, Sixth Report of Committee - May 31/79

The Committee in its Sixth Report detailed its consideration of this complaint made initially to the Ombudsman on April 14, 1976 as follows:

"This complaint concerns a decision of an Appeal Board panel of The Workmen's Compensation Board in December, 1976 which denied the complainant's application for benefits for symptoms referable to the complainant's low back disability. The Appeal Board panel refused to accept that a relationship existed between the low back symptoms complained of and the compensable injury which occurred in January, 1972.

The circumstances of the complaint and the Ombudsman's investigation are fully set out in the text of the Ombudsman's Report.

After completing his investigation, the Ombudsman formed the opinion that the Appeal Board panel wrongly concluded that there was no evidence to support any relationship between a low back disability and the compensable accident. He accordingly recommended, pursuant to Section 22 of The Ombudsman Act, that the Appeal Board should revoke its decision of March 3, 1976 and order that the complainant be granted entitlement to a permanent disability award in recognition of a low back disability.

The Workmen's Compensation Board declined to accept and implement the Ombudsman's recommendation. The Board is of the view that the delay between the compensable accident, the symptoms referable to the low back and the return to work in the interval supports the conclusion that the low back disability was not occasioned by the accident.

The Workmen's Compensation Board however, in response to the Ombudsman's recommendation, has appointed a medical referee to examine the issue of the causal relationship between the compensable accident and the person's low back symptoms. The Committee understands that the referee has only just begun his investigation. It further understands that The Workmen's Compensation Board has requested that the referee expedite his report.

The Committee is of the opinion that there was, in fact, evidence available to the Appeal Board panel of The Workmen's Compensation Board upon which a finding of a causal relationship between the compensable accident and the low back disability could be made. The Committee considers it is supported in this opinion by the actions of The Workmen's Compensation Board in causing a medical referee to be appointed to inquire into and assist it on that issue.

The Committee supports the recommendation of the Ombudsman made to The Workmen's Compensation Board in this matter. THE COMMITTEE THEREFORE RECOMMENDS THAT THE WORKMEN'S COMPENSATION BOARD REVOKE ITS DECISION DATED MARCH 3, 1976 AND ORDER THAT THE COMPLAINANT IS ENTITLED TO A PERMANENT DISABILITY AWARD RESPECTING THE LOW BACK DISABILITY FOR THE PERIODS REFERENCED IN THE OMBUDSMAN'S REPORT.<sup>(8)</sup> In making this recommendation, the Committee assumes that The Workmen's Compensation Board will be guided and assisted by the report of the medical referee in assessing the amount of benefits to be paid."

The Workmen's Compensation Board in response to that recommendation on July 10, 1979 re-considered its decision of March 3, 1976. The Board directed that its previous decisions be revoked and allowed the complainant the benefit of reasonable doubt. In so doing the Board concluded that the degenerative back condition which pre-existed the compensable accident was aggravated at the time of the accident, January 7, 1972. In accordance with its usual procedures it ordered that the complainant be examined by appropriate representatives of the Board to determine the degree of residual low back disability resulting from the compensable accident.

However, the permanent disability medical advisor who examined the complainant pursuant to the Board's decision concluded that there was "very little in the way of positive findings" to establish any residual low back disability. Accordingly no pension award was granted to the complainant notwithstanding the specific findings of the Board in its decision dated August 14, 1979. In other words, although the Appeal Board acknowledged a relationship between the compensable accident and the symptoms complained of, the Board declined to quantify those symptoms for the purpose of pension benefits.

However, prior to the hearings of the Committee and on the 10th day of June, 1980 an Appeals Adjudicator of the Workmen's Compensation Board effectively overruled the permanent disability consultant's assessment and awarded the complainant an additional 15% pension payment for the symptoms referable to the low back disability as a result of the compensable accident. The Ombudsman's office informed the Committee that it considered this additional assessment to be adequate and appropriate in the circumstances. The Committee concurs with that view and commends the Workmen's Compensation Board for its actions in complying with the Committee's recommendation in its Sixth Report.

- (ii) Complaint #77, Ombudsman's Fourth Report, Oct. 77 - Mar. 78  
Recommendation #16, Seventh Report of Committee - Sept. 17/79

The Committee in its Seventh Report commented upon this complaint initially received by the Ombudsman on the 20th October, 1976, as follows:

"The Committee's Fifth Report (pages 66-69) reported on its considerations of this case as follows:

This complaint concerns a decision of the Appeal Board of The Workmen's Compensation Board dated June 3, 1976 which denied the complainant compensation for a pre-existing spinal condition on the grounds that the cause of the condition is not related to anything which arose out of or occurred during the course of employment. The complainant contended on the appeal that the accidents which occurred during the course of employment at the material times aggravated in some way the pre-existing spinal condition and accordingly, he should, in some proportion, be compensated by the Board.

The circumstances of the complaint and the Ombudsman's investigation are set out in the text of the Ombudsman's Fourth Report.

After the Ombudsman's investigation was completed, he formed the opinion that the Board should confer the benefit of doubt on the complainant and should grant a permanent partial disability pension. In his opinion, the Appeal Board decision referred to above unreasonably denied the complainant entitlement to such a pension. Accordingly, he recommended that The Workmen's Compensation Board vary the Appeal Board's decision of June



3, 1976 and award a permanent partial disability pension to the complainant for the residual disability of the relevant compensable injuries sustained during the course of employment.

The Committee understands the basis of the Ombudsman's opinion to be that the benefit of doubt should be granted in that there is no unequivocal opinion by any physician to the effect that the accidents occurring during the course of employment either did or did not aggravate the pre-existing spinal condition. In fact, the Ombudsman's office is of the view that the prevailing medical opinions more support the complainant's assertion rather than the Board's.

The Board declined to implement the Ombudsman's recommendation on the grounds that there is no evidence to support the contention that the pre-existing condition and the symptoms emanating therefrom has been significantly changed by the relevant accidents which occurred during the course of employment. The Board further expressed the opinion that any disability which might be present and measurable at the present time would be the result of the underlying pre-existing condition and not the work incidents.

The Board representative appearing before the Committee advised that the Board never considered applying the doctrine of benefit of doubt because the Board felt that the prevailing medical opinions supported the Board's conclusions.

A member of the Appeal Board Panel which made the decision of June 3, 1976 appeared before the Committee. He advised that a certain medical opinion referred to by the Ombudsman in his Report to the Board pursuant to Section 22(3) of The Ombudsman Act to the effect that it would be quite impossible to produce medical evidence stating that the complainant has no residual disability as a result of the compensable accidents was not considered by the Board in formulating its response to the Ombudsman's Report.

The Ombudsman's office was unable to produce a written medical opinion in the terms referred to above. The Ombudsman's Report merely paraphrases a conversation a member of the Ombudsman's staff had with the doctor in question. The Committee considers the opinion of the physician in question to be critical and certainly if confirmed by this doctor in a written medical report, would make the application of the doctrine of benefit of the doubt, if, as and when formulated by the Board,



applicable. Accordingly, the Committee recommends that THE OMBUDSMAN FORTHWITH OBTAIN A MEDICAL REPORT FROM THE DOCTOR IN QUESTION IN RESPECT OF THE OPINION ATTRIBUTED TO HIM IN THE OMBUDSMAN'S REPORT PURSUANT TO SECTION 22(3) OF THE OMBUDSMAN ACT. THAT REPORT WHEN RECEIVED BY THE OMBUDSMAN SHALL BE FORTHWITH TRANSMITTED TO THE WORKMEN'S COMPENSATION BOARD. (31) The Committee further recommends that THE WORKMEN'S COMPENSATION BOARD UPON RECEIPT OF THAT MEDICAL REPORT CONDUCT A HEARING PURSUANT TO SECTION 75 OF THE WORKMEN'S COMPENSATION ACT AND THAT THE APPEAL BOARD PANEL PRESIDING AT THAT HEARING CONSIDER THE APPLICATION OF THE POLICY OF BENEFIT OF THE DOUBT TO THE CIRCUMSTANCES OF THIS CASE. (32)

The Committee is mindful that The Workmen's Compensation Board will consider all relevant medical evidence received by it either from the doctor in person or by means of a medical report signed by the doctor in question. The Committee accordingly recommends that HEREAFTER THE OMBUDSMAN ENSURE THAT ANY MEDICAL EVIDENCE RELIED UPON BY HIM IN SUPPORT OF HIS OPINIONS AND RECOMMENDATIONS BE OBTAINED IN WRITTEN REPORTS WHICH CAN BE READILY MADE AVAILABLE TO THE WORKMEN'S COMPENSATION BOARD. (33)

The Committee has in previous reports commented upon the obligations incumbent on the Ombudsman in performing Ombudsman functions and in particular making reports pursuant to Section 22(3) of The Ombudsman Act. The Committee wishes to say that there are also obligations on the governmental organizations in question who receive those reports to make their responses as complete and thorough as possible. Where, in the preparation of those responses, the governmental organization believes some aspect of the Ombudsman's report requires clarification or if additional information is necessary, the governmental organization should obtain the information from the Ombudsman or his staff as quickly as possible. The Committee is of the opinion that a freer dialogue between the Ombudsman and the governmental organization in question at this stage of the Ombudsman's process will probably eliminate a number of cases wherein recommendations are denied. In the Committee's opinion, this case is one of those.

The Committee notes the assurance by the Vice Chairman of Appeals of The Workmen's Compensation Board that upon receipt from the Ombudsman's office of a written report from the doctor in question an Appeal Board Panel will be constituted immediately for reconsideration of this case pursuant to Section 75. If, by the time this report is tabled in the Legislature, the Board has in fact done this, then the Committee recommends that IT ADVISE IT AND THE OMBUDSMAN OF THE BOARD'S DECISION AS SOON AS IT IS RENDERED. (34)"

In accordance with Recommendation No. 32 of the Committee's Fifth Report, The Workmen's Compensation Board convened a hearing and rendered a decision dated the 18th of July, 1979 wherein it denied the complainant entitlement to the benefits in question. On the question of the application of the policy of benefit of the doubt the Board stated that:

"The Appeal Board has considered the application of the policy of benefit of the doubt in the circumstances of this case and has concluded on the basis of the medical opinion that the policy is not applicable."

In the Committee's opinion this decision and the conclusion referable to the policy of benefit of the doubt is premature. The Committee in its Fifth Report, recommended that the Board reformulate that policy to one which is more workable and understandable. The process of drafting as the Committee has discussed earlier in this Report, is still underway. Therefore, the Committee recommends that THE WORKMEN'S COMPENSATION BOARD RECONSIDER THIS CASE PURSUANT TO SECTION 75 WHEN THE CORPORATE BOARD HAS FINALLY ADOPTED AND APPROVED THE POLICY OF BENEFIT OF THE DOUBT AS DISCUSSED WITH THE OMBUDSMAN AND THIS COMMITTEE.<sup>(16)</sup>

In making this recommendation the Committee does not intend to indicate whether the recommendation of the Ombudsman or the response

of The Workmen's Compensation Board is to be preferred. The whole reason for The Workmen's Compensation Board in having conducted a re-hearing was to consider a written medical report obtained by the Ombudsman's office subsequent to the Committee's consideration of this matter to confirm a medical opinion attributed to a physician retained by the Ombudsman's office that it is:

"impossible to produce medical evidence stating that the complainant has no residual disability as a result of his compensable accident."

The Committee notes that the medical report obtained is less categorical in nature. The doctor stated in writing that:

"Since (the complainant) had no back symptomology whatsoever prior to his injury (although the spondylitis was undoubtedly present), one cannot be absolutely sure that the injury was not responsible in some way for making his spondylitis symptoms clinically evident."

(end of quotation from Seventh Report)

An Appeal Board panel of the Workmen's Compensation Board by decision dated April 8, 1980 reconsidered its decision in light of the then revised policy on benefit of the doubt. The Board concluded that the policy of benefit of doubt as approved by the Corporate Board on the 12th of February, 1980 did not apply to the circumstances of the complainant's case. Accordingly, the Board confirmed its original decision dated July 18, 1979 in respect of which the Ombudsman recommended variance and that a permanent partial disability pension be awarded to the complainant for the residual disability of the relevant compensable injuries sustained during the course of employment.



The Committee is mindful that to date its recommendations have been directed more to a completion of the investigative process and the Workmen's Compensation Board's response thereto rather than to the merits of the initial recommendation made by the Ombudsman as reported in his Fourth Report. The Committee has considered in detail the relevant materials provided by the Ombudsman's office and representatives of the Workmen's Compensation Board. In addition it has discussed the circumstances of the Ombudsman's investigation, his ultimate recommendation and the Workmen's Compensation Board's response with appropriate members of the Ombudsman's office and the Workmen's Compensation Board.

The Committee notes that the Ombudsman does not rely on any additional matters in support of his recommendation beyond that which were reviewed with the Committee and the medical report which was obtained by the Ombudsman in compliance with Recommendation #32 of its Fifth Report. In the circumstances, the Committee is unable to support the recommendation of the Ombudsman in this case. The medical report obtained does not, in the opinion of the Committee, confirm a medical opinion attributed to a physician retained by the Ombudsman's office. The words "one cannot be absolutely sure that the injury was not responsible in some way for making his spondylitis symptoms clinically evident" attributed to the physician in the subject medical report are more in the nature of speculation than raising the issue to a level where the evidence for or against approximately equal in weight.

- (iii) Complaint #75, Ombudsman's Third Report, Apr. 77 - Sept. 77  
Recommendation #15, Fifth Report of Committee - Nov. 9/78

At page 86 of its Seventh Report the Committee, although unable to accept the recommendation of the Ombudsman in his Third Report recommended that:



"THE WORKMEN'S COMPENSATION BOARD WHEN THE POLICY OF BENEFIT OF THE DOUBT HAS BEEN APPROVED BY THE CORPORATE BOARD, RECONSIDER THIS CASE BY HEARING, PURSUANT TO SECTION 75 OF THE WORKMEN'S COMPENSATION ACT. AT THAT HEARING THE BOARD SHALL CONSIDER THE APPLICATION OF THE POLICY OF BENEFIT OF THE DOUBT TO THE ISSUES IN THIS CASE."

Pursuant to that recommendation an Appeal Board panel of the Workmen's Compensation Board re-convened on May 8, 1980 for the purpose of considering whether the new policy of benefit of the doubt has application to the circumstances of the complainant's case. The Board, by decision of the 26th of May, 1980 decided that the case did not come within the scope of the policy as approved by the Corporate Board on February 12, 1980 thereby denying the complainant's appeal and again declining to implement the original recommendation made by the Ombudsman.

In the Committee's opinion the Workmen's Compensation Board has totally complied with its recommendation. The Committee in making its recommendations did not wish to give any advice or direction to the Corporate Board on the consideration of the applicability of the said policy. It is sufficient in these circumstances that the Board has considered the new policy against the background of the circumstances of the original complaint.

(iv) Complaint #38, Ombudsman's Sixth Report,  
Recommendation #13, Seventh Report of Committee

At the time of the Committee's hearings in July, 1980 the Board had not as yet scheduled a hearing as required by Recommendation #13 in its Seventh Report.

Subsequently the Committee received a decision of an Appeal Board Panel of the Workmen's Compensation Board dated October 27, 1980. The Committee has considered this decision and before making any recommendation to the Legislative Assembly wishes to discuss it in more detail with appropriate representatives of the Workmen's Compensation Board.

The Committee has grave reservations that the Appeal Board Panel in this matter considered the application of the policy of the benefit of the doubt as intended by the Committee and as articulated by the Corporate Board policy itself. It is apparent to the Committee on the face of the Board's decision that the Appeal Board Panel took extraordinary steps to avoid applying the policy of the benefit of the doubt. It made findings of credibility against the complainant and his wife and resorted to the Canadian Medical Directory (25th Annual Edition) to assist it in assessing which psychiatric opinion it preferred.

The Appeal Board Panel may have inadvertently cast itself in the role of an adversary vis-a-vis the complainant and his wife and vis-a-vis the psychiatrists in question. After those issues are fully discussed and explained to the Committee it will report to the Legislature with any appropriate recommendations.

One might take from the Appeal Board's comments on pages 4 and 5 of its decision that the applicability of the policy of benefit of the doubt was determined by the content of the two psychiatrists' expertise, qualifications and experience as recorded by the Canadian Medical Directory. If that be so then the Committee is concerned that the Appeal Board Panel may have acted beyond the scope of and intent of the policy and the Act itself.

## 2. MINISTRY OF HEALTH

- (i) Complaint #45, Ombudsman's Fourth Report,  
Recommendation #1, Sixth Report of Committee  
Re: Ontario Hospital Appeal Board

In its Seventh Report the Committee commented as follows:

"On the 21st of June, 1979 the Honourable Dennis R. Timbrell, Minister of Health, advised the Legislature that:

I am looking at the legislation which prescribes the composition of the Board, and their appointments at the present time or at pleasure, to ensure that all interests, including hospitals, physicians and the general public, are and will be fully represented both on the Board itself and in any quorum of the Board.

I am also considering the related issue of whether it is appropriate that a minimum number of the Hospital Appeal Board members should not have past experience as a member of a hospital board and, pending final decision as to what legislative changes are appropriate, if any - and we may be able to do it in the next re-arranging of the membership of the Board - I have sought and I have obtained the assurance of the Chairman of the Hospital Appeal Board that the full Board from now on will sit on all cases, except where the parties otherwise agree, or where a member must disqualify himself by reason of a conflict of interest."

The Honourable Minister further advised the House that:

"Nevertheless, what I propose to do is to obtain a comprehensive review or information as to what systems of medical staff appointments prevail in other jurisdictions. I intend to get this from the Ontario Council of Health; I will ask them to do the review. I believe that such information will be of great assistance in formulating an appropriate approach to resolving this problem identified by the Ombudsman."

The Ministry's representative subsequently confirmed to the Committee that the Ministry intended to comply with Recommendation No. 1 of the Committee's Sixth Report.

With respect to the first part of the Committee's Recommendation No. 1, the Ministry advised that there are at present plans to change the appointment of Appeal Board members from the present system, which is at the pleasure of the Lieutenant-Governor In Council, to a system of time limited appointments on a staggered tenure basis.

The representative further described in some detail the inquiries made of the Ontario Council of Health by the Honourable Minister as set out in a letter forwarded to the Council on the 25th of June, 1979 (See Schedule "B").

It appears that the Ontario Council of Health was not made aware of the circumstances giving rise to this request nor was it provided with any background material which might be of assistance to it. The Committee understands that the Ministry of Health has no objection to providing the Council with certain background materials such as:

1. a copy of the Ombudsman's initial complaint summary;
2. transcript of the Committee's discussions of this complaint with the Ombudsman's Office and representatives of the Ministry, held in August, 1978;
3. relevant provisions of the Committee's Fifth Report wherein the particular complaint was reviewed (pp. 56-60 inclusive);
4. transcript of the Committee's discussion with the complainant, Dr. Claude McDonald on the 20th of March, 1979;
5. pages 3 to 12 inclusive of the Committee's Sixth Report;
6. the Hansard debates of the 21st of June, 1979; and
7. the transcript of the Committee's discussions with the Ministry representatives dated the 30th of July, 1979.

The Committee understands that this documentation will be forwarded to the Ontario Council of Health by the Ministry as soon as possible.

The Committee understands that the inquiries of the Minister as addressed to the Ontario Council of Health are not in fact the inquiry as contemplated by the recommendation. Rather it is a first step in an effort to gain necessary insights into the process in other jurisdictions which it is expected will assist in an articulation of the issues which the inquiry will address itself to. As at the 30th of July, 1979 the Ministry had not finalized the terms of reference of the inquiry beyond the letter to the



Ontario Council of Health and it had not as yet designated to anyone the responsibility to inquire and report.

The Committee hopes that the Ministry will finalize all these necessary matters as quickly as possible and that in the Fall of this year the Minister can report as to the status of the inquiry and the progress of the Ministry's implementation of the recommendation."

On the 6th of June, 1980 the Honourable Dennis R. Timbrell, Minister of Health, requested the Council of Health to inquire into the said provisions of The Public Hospitals Act from the point of view of:

- "1. Identifying what improperly discriminatory acts may flow therefrom;
2. Recommending any appropriate provisions which would have the effect of preventing such improperly discriminatory acts, and to report to the Minister thereon."

The Minister also provided the background information referenced by the Committee at pages 5 and 6 of its Seventh Report. (See Schedule "A").

The Committee has been advised that the Minister would not object to providing the Committee with a copy of the report when it is received from the Council of Health. The Committee looks forward to receipt of that report early in 1981.

The Minister of Health is reminded that to the extent that the Council of Health identifies appropriate legislative change and so recommends to the Minister the Committee will view those legislative changes as necessary to fully comply with the recommendations in its Sixth Report.

- (ii) Complaint #21, Ombudsman's Sixth Report,  
Recommendation #11, Seventh Report of Committee

The Committee reviewed this matter at pages 58 to 63 inclusive in its Seventh Report. At page 62, the Committee recommended that:

"THE MINISTRY OF HEALTH CAUSE AN AMENDMENT TO BE MADE TO THE HEALTH INSURANCE ACT PROVIDING THAT:

'WHERE THE AMOUNT PAYABLE BY THE PLAN FOR AN INSURED SERVICE RENDERED BY A PHYSICIAN IS NOT PRESCRIBED BY THE REGULATIONS, IT IS THE FUNCTION OF THE GENERAL MANAGER AND HE HAS THE POWER TO DETERMINE THE AMOUNT'."

This recommendation referred to the Ontario Health Insurance Plan and amounts payable for insured services not prescribed by the Regulations under The Health Insurance Act.

In response to that recommendation the General Manager of the Ontario Health Insurance Plan wrote to the Committee (See Schedule "B") expressing certain concerns should the recommendation of the Select Committee be implemented literally. The General Manager made certain suggestions by way of compromise which were acceptable to the Committee.

However, as a result of certain issues raised by representatives of the Ombudsman's office, the General Manager again wrote to the Committee purporting to answer the concerns. The Committee has considered both of these responses in detail. The Committee concurs with the view expressed by the General Manager that implementation of the Committee's original recommendation has the potential of referring every circumstance wherein payment out of the plan was refused on the grounds that services were not medically necessary to the Health Services Appeal Board.

The Ombudsman, however, does not consider that the response of the Ministry to the Committee's recommendations and to his recommendation is either adequate or appropriate. The Ombudsman remains concerned that non-surgical procedures are still excluded from Code R990 and that those persons who are denied the payment of services under that section will not be given any formal notice regarding the available appeal procedures.

The Committee acknowledges that the Ombudsman's concerns are genuine. The Committee also agrees that the potential for hardship flowing from a strict interpretation of Code R990 and any non-publication of available appeal procedures does exist. However, the Committee is prepared, for the present, to rely upon the representations contained in the General Manager's letters that Code R990 will in the future receive a lenient and flexible definition such that the two matters of complaint which were investigated by the Ombudsman would under the new coding be allowed for payment. The Committee is also influenced by the General Manager's assurance to the Committee that the appeal procedures will be available to persons in the future whose benefits are refused in similar circumstances.

The question, however, of whether and to what extent persons are given notice of the available appeal procedures continues to trouble the Committee. THE COMMITTEE THEREFORE RECOMMENDS THAT THE MINISTRY OF HEALTH GIVE PROMPT NOTICE TO ALL PERSONS WHOSE CLAIMS FOR BENEFITS UNDER R990 ARE IN THE FUTURE REFUSED, FULL PARTICULARS OF THE APPEAL PROCEDURES AVAILABLE TO THEM AT THE SAME TIME AS THE NOTICE OF REFUSAL IS COMMUNICATED. <sup>(1)</sup>

### PART III

#### SEVENTH REPORT OF THE OMBUDSMAN APRIL 1979 - MARCH 1980

The issues raised by the following matters are considered by the Committee to be of some significant and continuous interest to the Legislative Assembly.

#### A. STATISTICAL ANALYSIS

The Ombudsman's Seventh Report represents the first opportunity to

compare the activities of the office in twelve month time segments. In addition to the comments made by the Ombudsman at pages 1 to 3 of his Seventh Report, the Committee was provided with a statistical synopsis and a statistical comparison for the period referenced and for the previous twelve month period covered by his Fifth and Sixth Reports. (See Schedule "C").

On a comparative basis, the number of files opened in the period referenced decreased by approximately 15%. The Ombudsman attributes this fact to certain administrative changes resulting in the disposition of certain matters without the formal opening of a file.

During the same period there was a decrease in the number of files closed by almost 30%. This again was largely attributed to certain administrative changes respecting the opening of files and the expansion of certain complaint handling procedures. The Committee acknowledges that perhaps as much as 70% of that decrease in file closings may be attributed to administrative matters. However, the remaining 25% or approximately 500 cases must be attributable to other causes. It is too early to identify anything specific as the cause. The Committee intends to pursue this matter with the Ombudsman upon the issuance of his next report for the purpose of determining whether any trend can be ascertained or specific causes identified.

During the same period the number of files "in progress" increased by over one-third. Again the Ombudsman attributes this increase substantially to certain administrative and complaint handling procedure changes. The Committee is concerned that the increase in the number of "in progress" files has increased during a period wherein the number of files opened has decreased. It intends to review this matter in more detail with the Ombudsman upon the issuance of his next annual report.



The continuing and principal concern of the Committee in respect of complaint handling is the average duration required to close a file. During the period referenced, on a comparative basis, the average duration increased from 101 days to 153 days per file. The Ombudsman attributed this increase largely to (1) the introduction of administrative fairness procedures and (2) the reduced number of file openings for non-jurisdictional complaints that were otherwise handled as no follow up complaints.

The Committee is not convinced that these two items are the only cause of the increase in this duration. The Committee notes that particularly in the area of Workmen's Compensation Board complaints the average duration to close files continues to be inordinately high.

The Ombudsman at page 11 of his report, referenced a study of the system of handling complaints and the flow of files through his office. The Committee, during its next sitting, intends to review the implementation of the matters contained in that study with the Ombudsman for the purpose of determining the extent to which the average duration to the closing of files has been reduced. If no such reduction has been achieved, the Committee will consider with the Ombudsman that further action must be taken to bring the average file reduction down to an acceptable time frame.

B. CORRECTIONAL REPORT

The Ombudsman expects all matters relating to the Correctional Report initiated on the 31st of October, 1975 and dated December 20, 1977, will be completed shortly. The Committee understands that there are at present approximately 20 recommendations contained in the original report which have not been specifically addressed and/or implemented by the Ministry of Correctional Services to the satisfaction of the Ombudsman.

In any event of the final disposition of this matter, the Committee reminds the Ombudsman and the Minister of Correctional Services that a report on the final disposition of all recommendations contained in the Correctional Report would be tabled in the Legislature and made available to this Committee for any appropriate consideration.

The Committee assumes that the Ombudsman will be in a position to issue such a report by the time his next annual report is tabled (June 1981). At that time, the Committee will seek from the Ombudsman and the Minister of Correctional Services a report on the disposition of all matters contained in that Correctional Report.

C. NORTH PICKERING

At pages 11 through 21 inclusive of its Seventh Report, the Committee commented extensively on the developments of North Pickering matters. It is timely that these comments be reproduced in full here below:

"This Committee has, since July, 1976, continuously played an active part to assist in the earliest resolution of all outstanding matters raised by the Report of the opinion of the Ombudsman, his reasons therefor and recommendations concerning the North Pickering project dated the 22nd of June, 1976. To that end, in its first report to the Legislature dated October 15, 1976, the Committee recommended that:

"The Legislative Assembly approve in every respect the agreement reached between the Ombudsman and the Minister of Housing. This Committee further recommends that the commission to be appointed under the Public Inquiries Act, 1971, be appointed forthwith with terms of reference substantially in accord with the agreement between the Minister of Housing and the Ombudsman."

At that time it was the Committee's opinion and expectation that the avenues of inquiry intended by the agreement (Agreement) between the Ombudsman and the Minister of Housing dated October 1, 1976 (See Schedule "D"), would fully investigate, examine and thoroughly report upon, with minimum of delay, the following statement of issues adopted by the Committee on August 22, 1976:

"Re: Former Landowners within North Pickering Project

- (i) Should the 44 former landowners within the North Pickering Project, referred to on pages 90 and 91 of the Ombudsman's Report, be entitled to have each of their cases assessed by the Land Compensation Board for a determination as to what losses, if any, they each have incurred as a result of the sale of their respective properties prior to February 4, 1974 by relying to their detriment, on any or all of inadequate appraisals, misleading statements made by agents of the Ministry of Housing or a misunderstanding of statements made by agents of the Ministry of Housing.
- (ii) Is the procedure available under Section 30(a) of the Expropriations Act, applicable to a reference to the Land Compensation Board of the matters contained in (i) above.
- (iii) Should the Land Compensation Board or some other suitable forum have the jurisdiction with respect to the 44 landowners and any other former landowners to determine the issue of whether the individual landowners were misled and accordingly acted to their detriment, by any or all of inadequate appraisals prepared by agents of the Ministry of Housing; misrepresentations made by agents of the Ministry of Housing; or a misunderstanding of the representations made by agents of the Ministry of Housing.

THE OMBUDSMAN'S REPORT REFERENCES PROCEDURES  
EMPLOYED BY MINISTRY OF HOUSING  
REPRESENTATIVES IN THEIR DEALINGS WITH  
FORMER LANDOWNERS WHICH RAISES QUESTIONS OF  
GENERAL APPLICATION TO LAND ACQUISITION PROCEDURE

- (i) Is land acquisition by negotiation by a Ministry of the Provincial Government, a suitable procedure where the magnitude of the project and area of the land in question is comparable to that of the North Pickering Project.
- (ii) Should there be a minimum standard for appraisals and appraisal procedure required of Ministries of the Provincial Government in all forms of land acquisitions.



- (iii) Should there be a code of procedure and conduct adopted for land negotiators and acquisition agents who are employed by Ministries of Government for the purpose of carrying out all forms of land acquisitions.
- (iv) Should the same Minister of the Crown be required, in the future, to continue to be responsible for a specific project of comparable magnitude to North Pickering, until the project has been completed.
- (v) Should there be minimum standards of planning of a project comparable to that of North Pickering required of a Ministry of the Provincial Government before any public disclosure is made and before any actions are undertaken to acquire the lands within."

The Government and the Ombudsman acted promptly to implement the provisions of the Agreement which called for the appointment of a Commission of Inquiry and for hearings pursuant to Section 20 of The Ombudsman Act. However, not long after the Commission and the Ombudsman hearings got under way a number of events occurred which have, in the Committee's opinion, deflected the true nature, intent and purpose of the Agreement.

The Committee and the Ombudsman have both recognized this and have made comment from time to time. The Ombudsman made his concern known to the Assembly and the Committee in his First and Second Reports dated January 10, 1977 and July 14, 1977 respectively. The Committee addressed its concerns to the Legislature in its Second Report dated March 28, 1977 and thereby offered a solution to the difficulties which at the time plagued the Royal Commission of Inquiry. The Committee recommended (the Honourable Larry Grossman, Q.C., dissenting) that:

"The Legislative Assembly request that the Order-In-Council again be amended to remove any ambiguity as to the meaning of 'adversarial nature' and so as to give effect to the agreement reached on October 1, 1976, as intended by this Committee, by removing the sentence 'All matters referred to this Commission shall be heard and determined in proceedings of an adversarial nature.' from Order-In-Council, O.C. 2959/76."

No one, since that recommendation was made, has responded on behalf of the Government.

In its Third Report to the Legislature dated November 25, 1977, the Committee recommended that:



"the government cause the Commission's Report to be submitted forthwith and that immediately thereafter a Commission of Inquiry or other suitable forum be appointed with terms of reference identical to the agreement between the Minister of Housing and the Ombudsman dated October 1, 1976, such Order-In-Council to append as schedules thereto the said agreement and the transcript of the Select Committee's proceedings dated October 1, 1976. Further, the Order-In-Council to provide that the Commission or forum actively inquire into the issues relevant to the former landowners and the property acquisition agents, that the Commission or forum retain its own counsel to assist it in the investigation, preparation and presentation to it of all relevant evidence. With respect to the phrase 'adversarial nature', it should be given the identical context in the Order-In-Council as it is given in the agreement of October 1, 1976 as interpreted by the Court of Appeal in its judgment released April 1, 1977."

No one, since that recommendation was made, has responded on behalf of the Government.

Since its Third Report a number of events have occurred which have caused this Committee deep concern. This is a report of those events, the consequences flowing therefrom as perceived by this Committee, and the Committee's recommendations for a resolution of all outstanding matters with a minimum of further delay and expense.

In its Third Report to the Legislature, the Committee stated that:

"In the Committee's opinion, the Commission cannot submit a substantive report on all of the issues contained in and referenced by the said Order-In-Council, the agreement dated October 1, 1976 and by all parties who were either privy to, endorsed or concurred in that agreement. Any report submitted by the Commission will be of little or no assistance to the Government or the Legislature for any purpose related to the matters affecting the former landowners and the property acquisition agents. Such a report would also be capable of attack by persons affected of the type and substance as launched by counsel on behalf of the five land acquisition agents in respect of the Ombudsman's 'North Pickering' Report; that is, an action commenced in the Divisional Court of the Supreme Court of Ontario for a declaration that the Commission's report is null and void and of no legal force and effect. There has not been an inquiry as intended or expected by all those involved, of the relevant issues.

The Committee is of the opinion that all those who were either privy to, endorsed or concurred with the agreement dated October 1, 1976 have a duty to themselves, the Government, the Legislature and the people of the Province of Ontario to see the the issues contained in and referenced by the said Order-In-Council and as contained in the agreement dated October 1, 1976 are fully examined and thoroughly reported upon. If the Commission of Inquiry, as presently constituted, has terminated its proceedings thus falling short of its purpose as intended by all those involved, and as they have publicly confirmed from time to time, then a new Commission or other forum should be appointed forthwith with powers and responsibilities expressed in unambiguous language. The Order-In-Council, to avoid any further misunderstanding, any further delay, any further involvement by the courts, and any loss of public confidence, should have annexed thereto the agreement dated October 1, 1976 and the transcript of this Committee's proceedings dated October 1, 1976."

Subsequent to the Committee's recommendation, on the 5th of December, 1977, The Royal Commission of Inquiry submitted its report. The Attorney General tabled the report in the Legislature on March 10, 1978.

Dealing with the matter of the merits of the landowners' claims for additional compensation the Commission at page 131 of its report stated:

"The first matter referred to the Commission was the overall merits of claims for additional compensation by some of the former landowners. The only evidence presented on this issue consisted of a number of exhibits, including the file of the Ministry on the Mrs. Heather Dinsmore transaction, and some evidence in chief by Mrs. Dinsmore, who dealt with her complaints about the appraiser. She also gave evidence as to the visits by Mr. Bowles, an acquisition agent about whom she complained. The file contains an affidavit by him denying some of the statements about which she complained. From statements by her counsel, it would appear that it had been intended to lead much more evidence on her behalf. While the above evidence was led when the Commission was differently constituted and not repeated before the present Commission, it is not improper to comment that the facts of her claim were not sufficiently canvassed to enable a tribunal to make a determination of its merits. As Mrs. Dinsmore and the other claimants withdrew from the proceedings, the Commission is unable to consider, recommend and report on the overall merits of the claims for additional compensation by the former landowners."



The concerns expressed by the Committee in its previous reports and most particularly in its Third Report as quoted above, have been proven by the Royal Commission to have been well-founded. In the Committee's opinion implementation of Recommendation #1 in its Third Report (Page 13 supra), at the time it was made, was the only effective way in which the issues touching the former landowners could be thoroughly investigated and reported upon and in which all outstanding issues surrounding the "North Pickering Report" could have been appropriately resolved.

Since the publication of the Royal Commission's report, counsel for the five land acquisition agents named in the agreement between the Ombudsman and the Minister of Housing, have written on May 4, 1978, to the Attorney General and the Minister of Housing advising that his clients, by reason of certain statements made by the Ombudsman respecting the Royal Commission's report and the conduct of the inquiry conducted on the Ombudsman's behalf by Mr. Keith Hoilett, felt compelled to withdraw from those hearings. The land acquisition agents were concerned that the Ombudsman hearings would be used to vindicate the original allegations made by the Ombudsman against them in his report which allegations the Royal Commission has found not to be justified.

By reason of his clients' views of the Ombudsman hearings and the Ombudsman's comments respecting the Royal Commission report, counsel for the five land acquisition agents sought the appointment of a new Commission of Inquiry under the Public Inquiries Act to investigate the claims of the former landowners whose claims were being heard and reported upon by Mr. Hoilett.

The Ombudsman, by letter dated April 13, 1978 to the Minister of Housing, advised that he proposed to refer to the Supreme Court of Ontario the question of his jurisdiction to comply with a request made by counsel for the former landowners whose cases were heard before the Commission of Inquiry, that the Ombudsman further investigate those complaints and report appropriately to the Legislative Assembly.

On the 26th day of September, 1978, an application was launched in the Supreme Court of Ontario on the Ombudsman's behalf for an Order declaring the jurisdiction of the Ombudsman to re-investigate these former landowners' complaints and for an Order declaring whether any re-investigation on the part of the Ombudsman would breach or otherwise affect the agreement between the Ombudsman and the Minister of Housing dated October 1, 1976. The Committee understands that the final arguments in this application will be heard by the Chief Justice of the High Court of the Supreme Court of Ontario sometime in September, 1979.

On June 23, 1978, the Minister of Housing wrote to the Ombudsman (See Schedule "E") advising that, having regard to the conduct of those participating in the implementation of the Agreement, the Ministry would no longer be bound by the provisions of that agreement in that the findings of the Ombudsman arising out of the "Hoilett Hearings" would no longer be accepted without question. The Minister indicated that the Ministry will receive and treat the report presented by the Ombudsman on the Hoilett Hearings as any other Ombudsman's report. That is, the Minister of Housing would not be bound by agreement or otherwise, to implement all or any portions of any recommendations which may be contained in the report.

The Committee understands that all matters associated with the "Hoilett Hearings" will not be completed before the 12th of October, 1979. Counsel for the parties appearing before Mr. Hoilett are still in some process of preparation of written and oral argument.

In the result, the Committee is of the opinion that Mr. Hoilett will not have his report ready for submission to the Ministry of Housing, however it is to be treated by that Ministry, before the summer of 1980. In addition, if Mr. Hoilett's report is not treated as a final report of the Ombudsman pursuant to Section 22(3) of the Act, then it may be that provisions of The Ombudsman Act under Section 19(3) may be necessary before a "final" report may be submitted. All this will serve to further delay the ultimate disposition of this matter.

Therefore, regardless of the position taken by the Ministry of Housing and others with respect to the original Agreement, the Ombudsman will not be in a position to complete his obligations under it before the latter part of 1980. That notwithstanding, and in any event, the events which have occurred in the last three years and the positions taken by many of the parties concerned force the Committee to conclude - North Pickering is back to the same position it was when it first came to the Committee in July, 1976 - nothing has happened which can cause anyone to expect that North Pickering will be resolved, by any means, in the foreseeable future.

The Ombudsman is still contending for the solution as contained in his original report. The Ministry of Housing refuses to be bound by the Ombudsman's recommendations. The five land acquisition agents want a Royal Commission of Inquiry where they will have an opportunity to refute the allegations made against them by the Ombudsman in his original report. The former landowners affected are still seeking relief without any assurance from anyone that it will be forthcoming, where deserved. A Royal Commission of Inquiry did little if anything to assist in the resolution of the matters outstanding. The Ombudsman has held hearings under Mr. Hoilett's direction for almost two years at an enormous cost to the people of the Province of Ontario. The Ombudsman will submit a report to the Ministry of Housing which the Ministry considers not to be binding upon it in any way.

More recently and with the encouragement of this Committee the Ombudsman, the Minister of Housing, and counsel representing all former landowners have engaged in some discussions with a view to seeking a resolution of all outstanding matters on terms that are the most amicable and appropriate in the circumstances. The Committee understands that those discussions have not resulted in any "settlement" of all outstanding issues.

It is tragic to report that all of the public money spent since October 1, 1976 to implement the original agreement between the Ombudsman and the Minister of Housing, including the time and effort expended by those participating in the Royal Commission and in the Hoilett hearings, will be totally wasted unless all of those affected thereby commit themselves to achieving an appropriate solution for all in the quickest period of time. It is taking much too long to implement the original agreement.



In the Committee's opinion, there must be some individual claims of former landowners where agreement for settlement can be reached with the Ministry of Housing prior to and without the need for Mr. Hoilett's report. The Committee urges the Ministry of Housing, the Ombudsman and representatives of those former landowners to enter into discussions immediately after October 12, 1979 for the purpose of identifying any claims wherein agreement for settlement can be reached. In the event such claims are identified, the Committee urges those concerned to implement those settlements as quickly as possible.

The Committee understands that the Ombudsman has given Mr. Hoilett a deadline of Christmas, 1979 in which to finalize his report. Mr. Hoilett should be held to that deadline. If the report is completed by that date, it will keep North Pickering current in the minds of those who must work towards a final settlement.

Before Mr. Hoilett's report is completed, however, the Ombudsman and those who participated in the Hoilett hearings must clarify the matter of the publication of the report. It seems the Ministry of Housing was always of the view that the report of Mr. Hoilett would be made available to them. The Ombudsman on the other hand is less certain that the report was ever intended to be published. This issue has the potential of totally undermining any efforts towards settlement. The Committee urges the Ombudsman to make use of Mr. Hoilett's report in a way which is most conducive to and of greatest assistance towards the most appropriate resolution of North Pickering in the shortest period of time."

(end of quotation from Seventh Report)

Whereas the Committee believed that Mr. Hoilett had a deadline of Christmas 1979 to finalize his report, the Ombudsman advised the Committee that such was not the case. In any event, the report was not finalized by Christmas 1979 and it was not finalized by Christmas 1980. The Committee wishes to express its deep dismay at the time taken to complete the process as intended by the Agreement dated October 1, 1976, and in particular at the time taken by Mr. Hoilett to complete his report.

The Ombudsman has been unable to advise the Committee with any certainty when the Hoilett Report will be completed. It is obvious that the Ministry of Housing is not prepared to move towards any settlement of individual claims of former landowners or any other form of resolution of the matter before the Hoilett Report is received. Even when that report is received there

has been no assurance given that the matters will be resolved or that the Minister of Housing will honour the terms of the agreement dated October 1, 1976.

Those who believe that North Pickering will go away with the passage of time are being unrealistic. The issues that were so prevalent in 1976 respecting the North Pickering Project will return. Eventually the Minister of Housing and the Ombudsman will be required to accommodate the substantive provisions of the agreement dated October 1, 1976 regardless of its initial validity in law and regardless of the subsequent actions of the parties thereto.

Evidence that North Pickering will not go away can be found in the recent decision of the Ontario Court of Appeal which confirmed the Ombudsman's jurisdiction to further investigate the claims of the landowners whose cases were referred to the Royal Commission of Inquiry. The Committee is not aware of what the Ombudsman's plans are in respect of these complaints. However, it is now open for the Ombudsman to continue these investigations and to issue a separate report as provided by The Ombudsman Act.

Any further investigation by the Ombudsman will increase the number of reports that may ultimately be tabled in the Legislature and thereby referred to this Committee. The Committee wishes to advise the Legislature that if, as and when all the reports are received, its first order of business will be to inquire why the parties to the October 1, 1976 agreement were unable to resolve all outstanding matters during the three and a half to four years that Mr. Hoilett's efforts were underway.

In short, this Committee will be diligent in making a full determination of the actions of the parties to the October 1, 1976 agreement subsequent thereto for the purpose of reporting to the Legislative Assembly of the Province

of Ontario how North Pickering could remain unresolved some five years after the publication of the Ombudsman's initial report.

D. WORKMEN'S COMPENSATION BOARD

(i) Policy of Benefit of the Doubt

On the 12th day of February, 1980 the Workmen's Compensation Board approved a policy of benefit of doubt which is to be applied to all levels of decision making at the Board. This policy is the product of some discussion at various times within the last two years, between the Board, the Ombudsman and this Committee. It represents probably for the first time a policy of the Board which has been formulated and finalized as a result of a collaborative effort.

The effectiveness of this policy can only be gauged by future reference to decisions wherein it has been considered. It has the potential of granting entitlement to claimants in circumstances where previous policies of the Board would not have so permitted. The Committee urges the Ombudsman, as much as possible, to monitor the effectiveness of this policy and to report thereon to it on a continuous basis.

The Committee wishes to commend the Workmen's Compensation Board for its efforts in working with the Ombudsman and this Committee to achieve a policy dealing with a very complex concept which in this imperfect world is as good as one can achieve.

(ii) Backlog of Cases

As stated earlier, the backlog of cases involving Workmen's Compensation Board complaints is still inordinately high. This backlog, in the Committee's opinion, may be attributed to two factors:

1. the volume of Workmen's Compensation Board complaints made to the Ombudsman's office; and

2. the length of time taken by the Ombudsman's staff in their investigation and resolution of the cases.

The first factor is probably due to circumstances beyond the Ombudsman's control. As all members of the Assembly are aware, the highest proportion of constituency matters brought to their attention deal with the Workmen's Compensation Board.

However, the second factor in the Committee's opinion is substantially the responsibility of the Ombudsman and his office. The Committee notes that the Ombudsman has recently hired additional people on a contract basis for the purpose of expanding his investigative staff in Workmen's Compensation Board matters. That may provide some interim relief. However, in the Committee's opinion it will not provide a long term solution.

What is required is a full scale re-evaluation of the manner in which Workmen's Compensation Board complaints are investigated. The Committee is aware that these complaints are investigated by one department within the Ombudsman's office. However, the problems relating to the length of time required to investigate and finally dispose of Workmen's Compensation Board matters is one which transcends departments within the Ombudsman's office. It affects every person in that office and the Ombudsman himself. Any comments and criticisms respecting the manner in which Workmen's Compensation Board complaints are processed reflect on the office generally. It matters not to an injured workman in Sudbury that a complaint respecting the Ontario Lottery Corporation can be fully resolved within 60 days if it has taken the Ombudsman's office over two years before completing his Workmen's Compensation Board complaint.



These comments are not intended to be critical of anyone within the Ombudsman's office or with any particular complaint handling procedure. The persons dealing with Workmen's Compensation Board matters for the Ombudsman are truly dedicated and hard working. The fact is, however, that the office generally is unable to cope with the volume and nature of those complaints.

The Committee notes that the Ombudsman has commissioned a senior member of his office to conduct a two year study into the existing policies and practices of the Workmen's Compensation Board as they relate to complaints made to his office. Obviously that is an external study designed to identify and perhaps correct policies and practices within the Workmen's Compensation Board which may serve to improve the Ombudsman's ability to investigate these complaints and which may even reduce the number of complaints made.

The Committee also notes that the Ombudsman has recently completed a study of complaint handling procedures generally. The Committee intends to review that study and any implementation thereof in more detail with the Ombudsman during 1981. The Committee also intends to review in specific detail with the Ombudsman and his staff procedures employed thereby in the handling and investigation of Workmen's Compensation Board files.

The Committee understands that this step may be considered by some to be unusual and beyond the scope of its terms of reference. The Committee views its terms of reference as permitting it to consider with the Ombudsman any matter which has an effect on his ability to fully and effectively carry out his functions under The Ombudsman Act. In the Committee's opinion, the time taken to investigate Workmen's Compensation Board files is prejudicing the Ombudsman's ability to effectively carry out his functions in these areas.

E. RECOMMENDATIONS IN PREVIOUS OMBUDSMAN REPORTS IN RESPECT OF WHICH IT IS ANTICIPATED THAT SOME FURTHER ACTION WILL BE TAKEN BY THE GOVERNMENTAL ORGANIZATION AFFECTED

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In his Seventh Report the Ombudsman again appended two charts which summarized the recommendations made under the appropriate categories and the disposition of those recommendations made by the Select Committee and/or the governmental organization to which they were directed.

The Committee invited responses from all governmental organizations shown on the two charts wherein further responses and/or actions were required. In general these responses were positive and indicated that for the most part the governmental organizations in question had or were continuing to comply with the original recommendation made by the Ombudsman and any subsequent recommendation made by this Committee.

The Ombudsman will now continue to include these tables in each of his annual reports. The Committee intends as part of its regular procedures to review these charts with the Ombudsman and governmental organizations affected for the purpose of ensuring that total compliance by the governmental organizations with the recommendations in question is achieved.

F. RECOMMENDATIONS MADE BY THE OMBUDSMAN WHICH WERE DENIED BY THE GOVERNMENTAL ORGANIZATION IN QUESTION

(1) MINISTRY OF HOUSING

(i) Complaint #17, Ombudsman's Seventh Report

This concerns a complaint made against a local housing authority respecting its actions on an application for rental accommodation. The initial application for rental accommodation was made by the complainant in February 1979. Shortly thereafter the housing authority determined the applicant and his family to be eligible for rent geared-to-income accommodation and, having

regard to the state of the accommodation in which they were living saw that the need was urgent.

However, apparently as a result of certain inquiries and visits made by and on behalf of the housing authority, the decision to grant the complainant and his family accommodation was postponed or deferred on at least six occasions. On the 5th of November, 1979 the housing authority passed a motion "to postpone for an indefinite period" a decision to house the complainant and his family.

It appears that the housing authority based its ultimate decision to indefinitely postpone the housing of the complainant and his family on one or a combination of medical and behavioural problems reported to it by representatives of the authority, representatives of social service agencies who were involved with the complainant and his family, and by other sources in no way connected or associated with the housing authority or its decision making process.

The Ombudsman conducted a very thorough investigation into this matter and although he recognized the existence of certain health and behavioural problems associated with the complainant and his family, he concluded that they were in the majority related to the fact that the complainant and his family did not and never have had adequate housing. He noted in his investigation that representatives of the majority of social service agencies concerned attributed the lack of adequate housing as the significant cause of the problems in question. He formed the opinion that the housing authority in its consideration of the complainant's application from time to time, failed to take into account the social service agencies' opinions on the lack of adequate housing or the progress that the family had demonstrated even within the deplorable housing conditions confronting them.

The Ombudsman concluded that the housing authority had failed to justify its decision to continue to defer the application of the complainant and he accordingly determined, pursuant to Section 21(1)(b) of The Ombudsman Act, that the housing authority's decision to continue to defer was unreasonable. He recommended that the housing authority give the complainant and his family immediate accommodation in a suitable geared-to-income housing unit and if such unit is not available immediately that the authority accommodate the family in the first such unit which becomes available.

The housing authority declined to implement the recommendation of the Ombudsman mainly on the grounds that the facts which were made available to it prior to its various decisions to defer housing attributed the family's problems not to their residential environment but to other factors which were solely within their control. In other words, they were the authors of their own misfortune. Additionally, the housing authority apparently had received information from the same social service agencies to which the Ombudsman had referred which was inconsistent with that provided to the Ombudsman. Lastly, the housing authority apparently relied upon information obtained from third parties not in any way connected with the housing authority which indicated that the complainant and his family were unsuitable for placement in the particular housing unit. The Committee noted from the Chairman of the housing authority that this was an acquaintance of one of the housing authority members who knew of the family and who shared a past experience during a conversation one day on the street.

In essence the housing authority's reasons for deferring were centered around its collective opinion that the complainant and his family were just not suitable for the housing in question and that the authority members collectively



shared a concern that the presence of the complainant and his family would cause further deterioration of the condition of the housing units. Apparently the housing authority had had unfortunate experiences with other residents and it was concerned to avoid any repetition thereof.

The Committee must support the recommendation of the Ombudsman in this case. In the Committee's opinion the housing authority did not exercise its decision making function consistent with the spirit and intent of its Order-In-Council and of the Ontario Housing Authorities Field Manual and the guidelines contained therein.

The Committee has no doubt that the members of the housing authority acted in a way which they individually and collectively believed were in the best interests of all concerned and in a way which was consistent with the duties and obligations set forth in the Order-In-Council and in the said Field Manual.

However, the authority was unable in the Committee's opinion to give satisfactory answers to the central issue raised by the Ombudsman in his investigation, that without exception, everyone connected with this complainant and his family believed the key to their improvement and virtual salvation lay in suitable and adequate accommodation. The housing authority's decision to indefinitely defer housing placed this family in a Catch 22 situation from which they could never escape.

The Committee was reminded by representatives of Ontario Housing Corporation and members of the housing authority in question that it must have regard for the autonomy enjoyed by housing authorities in Ontario vis-a-vis the Ontario Government. That is, housing authorities are comprised of local community persons who are charged with the responsibility of carrying out

decisions which they consider to be in the best interests of the local community. It has been contended that any attempt to interfere or influence the course of that decision making function would render housing authorities in Ontario ineffective.

The Committee in no way wishes to downgrade the autonomy that housing authorities must enjoy. However, the fact remains that they are still agencies of the Crown. By the very Order-In-Council striking this housing authority it shall

"make by-laws, subject to the approval of the Minister of Housing, regulating its proceedings and the conduct of the affairs of the authority".

Further it

"shall be charged with and shall assume responsibility, as defined and determined by Ontario Housing Corporation for the management, operation and administration of such family and senior citizen housing projects".

Its entire decision making process respecting applications for rental accommodation is dictated by the Ontario Housing Corporation Field Manual and Chapter 7 in particular. Therefore, while housing authorities may carry on autonomously within their local community, they are nevertheless bound to courses of conduct stipulated by the Order-In-Council and by the Minister of Housing.

Housing authorities in Ontario are governmental organizations within the jurisdiction of the Ombudsman. As such and therefore regardless of the context within which they operate they are subject to any investigation of the Ombudsman and thereby subject to the process of this Committee and the Legislative Assembly.

In the Committee's opinion, the actions of the housing authority in question were not consistent with its rights and responsibilities as articulated by the Order-In-Council and the Ontario Housing Corporation Field Manual. The reasons given by the Ombudsman in support of his opinion and recommendations are overwhelming when compared to the reasons provided by the housing authority for its decision to indefinitely defer the housing of the complainant and his family.

Accordingly, the Committee recommends that THE LEGISLATIVE ASSEMBLY APPROVE AND ADOPT THE RECOMMENDATION OF THE OMBUDSMAN AND THAT THE HOUSING AUTHORITY IN QUESTION GIVE THE COMPLAINANT AND HIS FAMILY IMMEDIATE ACCOMMODATION IN A SUITABLE GEARED TO INCOME HOUSING UNIT; AND IF A SUITABLE UNIT IS NOT AVAILABLE IMMEDIATELY, THAT THE HOUSING AUTHORITY ACCOMMODATE THE FAMILY IN THE FIRST SUCH UNIT WHICH BECOMES AVAILABLE <sup>(2)</sup>.

Further, the Committee cannot but believe that had the Ontario Housing Corporation given this housing authority more in the way of guidance respecting its decision making functions, this complaint may not have arisen. The Committee recognizes that the rules of natural justice may not strictly apply in the circumstances of this decision. However, the emerging principle of administrative fairness may very well have application to decisions of that nature. That is, housing authorities in Ontario exercising their decision making authorities in the matter of subsidized residential accommodation, may very well have to treat applicants fairly by adhering to certain rules of substantial and procedural law. In any event, in the Committee's opinion, it is incumbent upon the Ontario Housing Corporation to give the housing authorities in Ontario more

guidance and directions in the matter of decision making than that which is now found in its manuals. Accordingly, the Committee recommends that THE ONTARIO HOUSING CORPORATION IMMEDIATELY CONDUCT A REVIEW AND STUDY OF ITS MANUALS AND THE DECISION MAKING FUNCTIONS OF HOUSING AUTHORITIES IN PARTICULAR FOR THE PURPOSE OF AMENDING ITS MANUALS TO GIVE HOUSING AUTHORITIES MORE GUIDANCE IN ORDER THAT THE RULES OF ADMINISTRATIVE FAIRNESS WILL BE MORE STRICTLY ADHERED TO (3).

(ii) Complaint #18, Ombudsman's Seventh Report

This complaint concerns a refusal by the Ontario Housing Corporation (OHC) to pay the claimant a sum of money alleged due under The Public Works Creditors Payment Act.

As a result of the Ombudsman's investigation and the opinions formulated by him, he made four recommendations to the Ontario Housing Corporation, the substance of which would acknowledge a sum of money due to the claimant under The Public Works Creditors Payment Act thereby permitting OHC and the claimant to look to the surety in question for payment.

During the Committee's hearing in July, the General Manager of Ontario Housing Corporation advised the Committee that the Corporate Board had re-considered its position and decided to accept the recommendations of the Ombudsman as contained in his report and in the course of implementing those recommendations accepts that the claimant is owed the sum of \$18,196.57 which amount should be made by the surety in question. The Ombudsman, after considering this position, advised the Committee that it was an adequate and appropriate response to his recommendations. The matter was accordingly resolved and the Committee did not review this case in any detail.



The Committee wishes to commend the Ontario Housing Corporation and its General Manager for its handling of this complaint. This occasion marked the first time wherein the OHC and its representatives attended before the Committee to deal with any recommendation denied cases. They have demonstrated a sincere respect for the Ombudsman and his office and a genuine willingness to assist him in the performance of his functions.

(2) MINISTRY OF REVENUE

(i) Complaint #36, Ombudsman's Seventh Report

This complaint concerns a decision of the Ministry of Revenue denying the complainant's application for an Ontario Home Buyer's Grant in respect of a purchase of a mobile home. The Ministry refused the complainant's application on the grounds that the mobile home purchased did not comply with the CSA standards that the Ontario Home Buyer's Grant Act required.

The substance of the original complaint was that the standards stipulated by the Act did not exist at the time the mobile home was manufactured and accordingly the Act discriminated against all homes manufactured prior to the introduction of CSA standards into the program. The Ombudsman ultimately concluded that he could not support that complaint.

However, during the course of the Ombudsman's investigation, he formed the possible conclusions that certain Ministry employees did not follow appropriate procedures with respect to the confirmation of the complainant's eligibility for grants. In accordance with Section 19(3) of The Ombudsman Act, he advised the Ministry that it might be open for him to conclude that since the complainant was given erroneous information by the Ministry, it was unreasonable within the meaning of Section 22(b) of The Ombudsman Act for the Ministry to refuse to grant the complainant an Ontario Home Buyer's Grant.

The Ombudsman further advised that a possible recommendation he could make when his investigation was concluded was that the complainant be paid the sum of \$1,000.00 in lieu of a Home Buyer's Grant.

The Ministry responded to the Ombudsman's notice under Section 19(3) of The Ombudsman Act re-confirming its original decision to refuse the complainant's application. The Ministry effectively disagreed with any finding of the Ombudsman either that the complainant was given misinformation or that any Ministry employees had failed to follow appropriate procedures.

The Ombudsman, upon the completion of his investigation, issued his report to the Ministry pursuant to Section 22(3) of The Ombudsman Act determining that the Ministry was "unreasonable" within the meaning of Section 22(b) of The Ombudsman Act in refusing to grant a sum of \$1,000.00 to the complainant in lieu of the Ontario Home Buyer's Grant. In other words, the Ombudsman found as unreasonable the Ministry's response to the possible recommendation of the Ombudsman as set out in his notice pursuant to Section 19(3) of The Ombudsman Act. It is to be noted that at no time prior to the Ombudsman's 19(3) notice was the Ministry asked to consider the payment of \$1,000.00 to the complainant in lieu of granting entitlement under the program.

During the course of the Committee's review of this complaint with representatives of the Ombudsman's office, it became apparent that the Ombudsman's investigation raised many unanswered questions. For example, at no time during the Ombudsman's investigation did anybody from his office interview the complainant personally. The initiative for this complaint appears to have come from the owner of the mobile home park where the complainant's home is situated and who apparently was instrumental in the sale of the home to the complainant. It is also this latter person who apparently was given the misinformation by the Ministry representatives.

At the suggestion of the Committee, the Ombudsman and his staff, with the concurrence of the Ministry of Revenue, agreed to further investigate this matter for the purpose of obtaining answers to the unanswered questions disclosed at the Committee's hearings and for the purpose of permitting Ministry of Revenue representatives to participate in the examination under oath of the complainant and the mobile home park owner. Accordingly, the Committee deferred any further consideration of this complaint pending that further investigation.

However, in September the Committee was informed by the Ombudsman that efforts to secure the co-operation and attendance of one of the two witnesses was unsuccessful. For this and other reasons the Ombudsman declined to pursue his further investigation.

The Ombudsman also noted in the letter so informing the Committee that:

"I have reviewed my original report and recommendation in this complaint. In doing so I have had a more leisurely opportunity to consider all the information obtained in our investigation than I had at the time. I issued my report, soon after I assumed my duties as Ombudsman. The report and recommendation, having been issued must stand. However, I do wish to say that having studied all the available evidence, I would not now reach the same conclusion as I did then."

The Committee cannot support the recommendation of the Ombudsman. It commends the Ombudsman for his very frank admission respecting the "second look" at this complaint. However, the Committee wishes to advise the Ombudsman that in all probability it would not have supported this complaint in any event of a further investigation. The Ombudsman has done in this complaint the very thing that the Committee commented on respecting Complaint #38 in his Sixth Report. That is the opinion formulated by the

Ombudsman in this case as to the unreasonableness of the Ministry of Revenue refers not to the original decision of the Ministry in denying the complainant's entitlement to a grant which decision was the subject matter of the Ombudsman's investigation, but to a "decision, recommendation, act or omission", made by the Ministry of Revenue during the course of the Ombudsman's investigation and only in direct response to a possible recommendation as set forth in the Ombudsman's notice under Section 19(3).

The Committee repeats its comments in the Seventh Report that:

"This approach and interpretation of The Ombudsman Act was never intended by the Legislature. In effect, it casts the Ombudsman in an adversarial role vis-a-vis the governmental organization. This approach, in the Committee's opinion, can only undermine the critical working relationships that must exist with the Ombudsman's office by governmental organizations, and the respect that governmental organizations must have for the Ombudsman Reports when issued."

In order that there can be no further misunderstanding, the Committee will not hereafter support any recommendation made by the Ombudsman which flows from any conclusion he has reached pursuant to Section 22 of The Ombudsman Act, which conclusion is based upon the response by the governmental organization to any possible recommendation contained in a 19(3) notice or in response of any other form of suggestion made by the Ombudsman or his staff during the course of an investigation. In the Committee's opinion any opinions and recommendations made by the Ombudsman pursuant to Section 22 of The Ombudsman Act must relate to the original "decision, recommendation, act or omission" which forms the basis of the investigation.

### 3. WORKMEN'S COMPENSATION BOARD

#### (i) Complaint #19, Ombudsman's Seventh Report

This case concerns the complaint against a decision of the Workmen's



Compensation Board dated the 13th of August, 1977 denying the complainant's claim for entitlement to benefits as a result of an injury sustained by accident arising out of and in the course of employment on April 9, 1976 or further disablement arising out of an accident which occurred at work on the 25th of July, 1969.

In 1969 the complainant slipped on some water at work landing on his lower back. He was medically treated at the time for certain symptoms although no time from work was lost.

On April 9, 1976, the complainant alleged that while lifting and moving a box at work weighing approximately 25 to 30 pounds, he felt a pulling sensation in his back and a sharp pain. The complainant reported to the plant hospital for treatment on the same day and on subsequent days. After the accident the complainant carried out "modified employment" until the 23rd of April, 1976 when he was laid off from work due to continuous disability related to the symptoms.

The Ombudsman, after he completed his investigation, concluded that the history of medical treatment received by the complainant for symptoms referable to an injury to the particular area of the back in question were entirely consistent with causal connections between the two occurrences in 1969 and 1976. Accordingly, the Ombudsman concluded that the incident occurring at work on the 9th of April, 1976 aggravated the complainant's pre-existing back condition which resulted in his ultimate lay off from work. He further concluded that the accident of July 25, 1969 had no relationship to any disabilities suffered as a result of the April 1976 incident.

The Ombudsman accordingly reported to the Workmen's Compensation Board that in his opinion the decision of the Appeal Board of August 30th,

1977 was unreasonable and in accordance with Section 22(3)(g) of The Ombudsman Act, 1975 he recommended that this decision be revoked and that the complainant be extended the benefit of reasonable doubt and granted entitlement for an incident arising out of and in the course of his employment on the 9th of April, 1976 which incident aggravated a pre-existing back condition. The Ombudsman further recommended that the complainant be awarded all appropriate compensation benefits.

The Workmen's Compensation Board declined to implement the Ombudsman's recommendation. Although the Board accepted that the complainant suffered an onset of back pain in April 1976, it did not conclude that a causal relationship had been established between the work performed and the subsequent symptoms. The Board, it seems, concluded that the symptoms related to a pre-existing non-compensable back disability. The occurrence of the symptoms at work appears to have been taken by the Board as mere coincidence.

During the Committee's consideration of this case, it became apparent that the response made by the Board to the Ombudsman's recommendation could not be supported in fact. The Committee members arrived at a consensus that in its next report it would support the recommendation of the Ombudsman and so recommended its implementation to the Legislature. To that end, it passed a formal motion that the Committee in its next report would recommend to the Legislative Assembly the implementation of the Ombudsman's recommendation in this case.

In response to the Committee's motion, the Workmen's Compensation Board conducted a hearing on the 9th of October, 1980. The Appeal Board, by decision of November 5, 1980, extended the benefit of reasonable doubt in the complainant's favour and concluded that on the 9th of April, 1976 he sustained

personal injury, in the form of disablement, arising out of and occurring in the course of his employment.

The Committee has considered the decision in its entirety. It accepts it as full compliance with its recommendation and the recommendation of the Ombudsman as contained in his original report.

This marks the first time where this Committee has publicly and concurrently with its consideration of the Ombudsman's report decided whether or not to support a recommendation of the Ombudsman and so recommend same to the Legislative Assembly.

One of the greatest frustrations felt by this Committee is the time lag between the issuance of the Ombudsman's report and the ultimate implementation of this Committee's recommendations which have been approved and adopted by Order of the House. This delay will be even further compounded now that the Ombudsman will report in the future generally on an annual basis. Accordingly, the Committee intends to adopt this procedure during its hearings whenever it becomes obvious that either the response of the governmental organization in question is inadequate or inappropriate or whenever it appears that the recommendation of the Ombudsman cannot be supported.

Where the Committee passes a motion during its hearings that it will recommend the support and implementation of an Ombudsman recommendation to the Legislative Assembly, it will expect the governmental organization to act immediately in response to that motion. A governmental organization should not wait upon the formal vote of the Legislative Assembly approving and adopting the recommendation in question. The actions of the Workmen's Compensation Board by its response to the Committee's motion are proof that this procedure can be effective by providing a certainty of result in a much shorter period of time.

In accordance with the Committee's motion, the Committee recommends that THE WORKMEN'S COMPENSATION BOARD REVOKE ITS DECISION DATED AUGUST 30, 1977 AND EXTEND TO THE COMPLAINANT THE BENEFIT OF REASONABLE DOUBT TO GRANT ENTITLEMENT FOR AN INCIDENT ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT ON APRIL 9, 1976 WHICH AGGRAVATED A PRE-EXISTING BACK CONDITION AND AWARD THE APPROPRIATE COMPENSATION BENEFITS <sup>(4)</sup>.

(ii) Complaint #28, Ombudsman's Seventh Report

This complaint was made to the Ombudsman from a decision of the Workmen's Compensation Board dated January 12, 1978 denying the complainant's claim for disability benefits for injuries suffered by the complainant in the cervical area of his spine. The Board found that there was no evidence to indicate that the work related incident which occurred on the 3rd day of October, 1975 wherein the complainant was struck on the neck by a concrete chute thereby causing the disability. The Board, although it accepted an occupational accident did occur on the 3rd of October, 1975, concluded there was no evidence to establish that the disability, for which medical attention was sought in December 1975 and subsequently, was related to the accident.

The Ombudsman, after he completed his investigation, found that the complainant immediately after the accident in October 1975 felt pain in the right shoulder and neck area and slight dizziness. On the day of the accident, the complainant's employment was terminated. The complainant asserted that within a week of the incident he sought medical attention from his family physician although no record was made. It was not until July 1976 when the complainant was admitted to a hospital with certain respiratory and other ailments that the condition referable to the cervical spine was diagnosed and



treated. Thereafter a series of medical specialists examined and treated the complainant, all of whom have expressed the opinion to the Ombudsman and the Workmen's Compensation Board that although, at the time of the accident, the complainant was probably suffering from deteriorating disc disease, the incident in question did aggravate the condition and accelerate the advancement of the symptoms from which the complainant is now suffering.

The only medical opinion contrary to this position was a report of a surgical consultant of the Workmen's Compensation Board who reviewed the Board's file and expressed an opinion that the Board would not be justified in accepting the complainant's complaints under this claim. It is to be noted that the surgical consultant did not appear to comment in his report on all opinions of the specialists who have treated the complainant. Moreover, he does not appear to have physically examined the complainant prior to rendering his opinion.

The Ombudsman determined that the Appeal Board was wrong to conclude in its decision of January 12, 1978 that there was no evidence to indicate that the complainant's disability was related to the accident of October 3, 1975. He therefore recommended that the Appeal Board vary its decision of January 2, 1978 and grant the complainant temporary disability benefits from the date of the accident until such time as medical evidence indicates that his condition stabilized. At that time, the complainant should then be granted a permanent disability award in an amount to be determined by the Workmen's Compensation Board.

The Workmen's Compensation Board, in response to the Ombudsman's recommendation, took the view that a conflict of medical opinions existed between the specialists referred to by the Ombudsman and the Board's own surgical consultant. The Board accordingly referred the question of the

relationship between the symptoms suffered by the complainant and the compensable accident to a medical referee.

The Ombudsman rejected this response by the Workmen's Compensation Board on the grounds that in his opinion a medical referee was unsuitable having regard to the overwhelming evidence of the medical specialists referred to in his report. He accordingly requested a formal response from the Board forthwith.

Nonetheless, the Workmen's Compensation Board awaited upon the report of its medical referee before formally responding to the Ombudsman, a period of some 3½ months. In that response the Workmen's Compensation Board rejected the recommendation of the Ombudsman and accepted the report of its medical referee which substantially supported the Board's original decision. In that response the Board made findings of credibility against the complainant that it was "not consistent for a man, who has no hesitation about complaining over safety conditions, to make no complaint of symptoms stemming from an incident in his employment. The Board is satisfied that, had he been having symptoms of any significance, the complainant would have complained of them, and he would have sought medical attention for them." The Board relied heavily, in its response, on what it termed as the "complete absence of established medical attention between the accident on October 3, 1975, and December 1, 1975, and again from December of 1975 until July, 1976."

The Board further rejected the medical opinions relied upon by the Ombudsman in his report. In that regard, the Board preferred the opinion of the medical referee which was essentially that if any symptoms were precipitated by the October 1975 incident they would have been minimal or would have resolved themselves before July 1976 when the complainant was treated at hospital.

The response of the Workmen's Compensation Board acknowledged that the statement in the decision of January 12, 1978 that "there is no evidence to indicate that the disability for which medical attention was sought in December 1975 and subsequently, is related to that accident." was wrong. The Board acknowledged that there was some such evidence as expressed in medical opinions of doctors which the Ombudsman had quoted in his report. However, in the Board's view those opinions were not supported by any explanation of why and how those doctors reached the conclusion that a relationship existed given the absence of evidence of continuing complaint or medical attention. In other words, the Workmen's Compensation Board imposed a retroactive standard upon the opinions of medical specialists which support the causal relationship between the work related incident and the symptoms complained of.

The Committee supports the recommendation of the Ombudsman in this case. The Committee agrees with the Ombudsman that the preponderance of medical evidence supports the conclusion that the incident which occurred at work in October 1975 aggravated a pre-existing condition of the cervical spine and caused in some proportion, the symptoms complained of.

Support for the Ombudsman's recommendation of necessity rejects the report of the medical referee obtained by the Workmen's Compensation Board. On any basis of comparison of the merits of all available medical reports the Committee agrees with the Ombudsman that those of physicians who have attended and treated the complainant are the most reliable.

There are other reasons. The Committee concurs with the opinion of the Ombudsman that the appointment of a medical referee after the Ombudsman's investigation had been completed was totally inappropriate. A medical referee can, in some cases, perform a valuable function in cases which the

Ombudsman is investigating. That function should be performed at the very beginning of the Ombudsman's investigation and not when it has been completed.

To appoint a medical referee for the purpose of responding to a report of the Ombudsman cannot help but be interpreted as having adversarial overtones. In fact the very wording of this medical referee's report can be taken to be more a response and rebuttal of opposite medical opinions rather than a report designated to express objectively a medical opinion.

Therefore, the Committee recommends that THE WORKMEN'S COMPENSATION BOARD VARY ITS DECISION DATED JANUARY 12, 1978 AND GRANT THE COMPLAINANT TEMPORARY DISABILITY BENEFITS FROM THE DATE OF HIS ACCIDENT (OCTOBER 3, 1975) UNTIL SUCH TIME AS MEDICAL EVIDENCE INDICATES THAT THE COMPLAINANT'S CONDITION IS STABILIZED. AT THAT TIME THE COMPLAINANT SHOULD THEN BE GRANTED A PERMANENT DISABILITY AWARD IN AN AMOUNT TO BE DETERMINED BY THE WORKMEN'S COMPENSATION BOARD <sup>(5)</sup>.

(iii) Complaint #30, Ombudsman's Seventh Report

This is a complaint made against a decision of the Workmen's Compensation Board dated the 29th of July, 1977 which denied the complainant's claim for entitlement to increased permanent partial disability benefits. The Board denied increased benefits on the grounds that the evidence presented at the hearing would not substantiate the contention that the complainant's condition had deteriorated since the original assessment.

On the 24th of November, 1972 the complainant, during the course of his employment twisted his back while using a sledge hammer. He was treated for lumbo sacral strain as aggravating a pre-existing degenerative disc disease. The complainant received a series of treatments and assessments until April



1974 when he was granted a 20% permanent partial disability award. The complainant has been unable to return to his previous type of work in view of the compensable injury. In 1976 the Workmen's Compensation Board re-assessed the injury and at that time confirmed the 20% award. Since that time the complainant has endeavoured to have the pension increased on the grounds that the condition has deteriorated since the original pension assessment.

The Ombudsman's investigation centered on the nature and extent of the medical opinions available referable to the complainant's condition since the initial assessment in 1974. In the Ombudsman's opinion the medical reports of two doctors, one an orthopaedic specialist, supported the complainant's contention that his disability had in fact deteriorated since that date. The Committee notes, however, that the opinion of the orthopaedic specialist does not state categorically that the condition had deteriorated or that an increased pension award was appropriate.

The question of the nature and extent of the deterioration suffered by this person since 1974 is, in the opinion of the Committee, rather academic. What is more significant is the conclusion reached by the Ombudsman after his investigation that the impairment to the complainant's earning capacity due to his accident had been substantial. He expressed his view to the Workmen's Compensation Board that on the facts of this case the impairment caused to the complainant's earning capacity as a result of the compensable accident is more than 20% even if assessed on an aggravation basis. He formed the opinion that the decision of the Appeal Board dated July 29, 1977 to deny the complainant an increased permanent disability award was unreasonable. He recommended pursuant to Section 22(3)(g) of The Ombudsman Act, 1975 that the Appeal Board revoke its decision and grant the complainant an increase in his permanent

partial disability award of 20% pursuant to Section 42 of The Workmen's Compensation Act.

The Workmen's Compensation Board declined to implement the Ombudsman's recommendation essentially on two grounds. Firstly, the prevailing medical opinions did not support a deterioration of the complainant's low back disability. In fact the Board relied on some evidence to suggest that the condition has improved since 1974.

Secondly, the Board declined to employ the provisions of Section 42 of The Workmen's Compensation Act in this case on the grounds that it did not recognize that the impairment of earning capacity was significantly greater than is usual for the nature and degree of the injury suffered and that the complainant had removed himself from the labour market and declared himself totally disabled.

In this case, the Ombudsman and the Workmen's Compensation Board have joined issue on the interpretation of Section 42 of The Workmen's Compensation Act and in particular Section 42(1) which is as follows:

"42.-(1) Where permanent disability results from the injury, the impairment of earning capacity of the workman shall be estimated from the nature and degree of the injury, and the compensation shall be a weekly or other periodical payment during the lifetime of the workman, or such other period as the Board may fix, of a sum proportionate to such impairment not exceeding in any case the like proportion of 75 per cent of his average weekly earnings during the previous twelve months or such lesser period as he has been employed."

The Ombudsman interprets that section as permitting the Workmen's Compensation Board to estimate the impairment of earning capacity on the basis of any and all relevant evidence. The Workmen's Compensation Board on the other hand does not believe it has the discretion to make any award under this section beyond a clinical assessment made by duly qualified medical

practitioners. In other words, the Board interprets the section as creating an inextricable link between the assessment of the nature and degree of the injury and the impairment of earning capacity. The Ombudsman on the other hand is of the opinion that any estimate of the impairment of earning capacity is not solely tied to any physical assessment of the injury and sequelae.

The Committee is unable to support the recommendation of the Ombudsman to the extent that that recommendation relies upon available medical opinions for the conclusion that the condition of the complainant has deteriorated since 1974. However, as the Committee understands the Ombudsman's position, it is not necessary for there to have been any deterioration in order for the Board to implement the recommendation by increasing the pension benefits to the complainant.

The critical issue therefore is whether, having regard to the injury suffered by the complainant and the symptoms occasioned thereby, the complainant has suffered an impairment of earning capacity disproportionate to the nature and extent of the injury suffered.

The interpretation placed on all of Section 42 of The Workmen's Compensation Act by the Workmen's Compensation Board makes no provision for a workman in Ontario to receive a disability payment for an impairment of earning capacity greater than otherwise might be expected, on an indefinite basis where that workman, because of the injuries and the disability and degree of impairment is effectively removed from the work force. In the Committee's opinion this anomaly only exists because of the Board's interpretation of Section 42(1), that is, impairment of earning capacity is dictated by clinical assessment of the nature and degree of the injury. In support of its interpretation of Section 42(1), the Workmen's Compensation Board provided the Committee with a

directive dated January 29, 1980 on the extent and limits of that section. This directive appears to represent a distillation of the Board's practice in dealing with cases coming within the section. This directive was also available to the Board when it formulated its responses to the Ombudsman's recommendation.

This directive and Sections 10 and 11 in particular (see Schedule "D") totally contradict the interpretation of Section 42(1) that the Board has publicly articulated from time to time. It clearly establishes that any assessment of benefit relative to impairment of one's earning capacity is not inextricably tied to a clinical assessment but may be derived from a number of sources more particularly enumerated in Section 11 of the directive.

The Committee gave the Board an opportunity to make further submissions to it respecting the interpretation and application of Section 42(1) of The Workmen's Compensation Act. On August 22, 1980 the Committee received the further submissions. The Committee understands that the directive (Schedule "D") had been rescinded subsequent to its review by the Committee.

This additional information provided and in particular the guidelines for the rating of permanent disabilities approved by the Board on February 12, 1980 (see Schedule "E") again confirms that disability awards made under Section 42(1) are not inextricably tied to the nature and extent of the clinical assessment of the nature and extent of the injury. Under the heading "Cases Not Meeting General Criteria" of guidelines Section 7 provide that:

"Permanent disability cases which do not meet the general criteria should be individually judged and dealt with equitably and fairly having regard to all circumstances."

There is no requirement in the directive or in fact in the legislation which ties benefits under this section solely to the clinical assessment of the injury.



The Committee supports the recommendation of the Ombudsman particularly as it relates to his interpretation of Section 42(1) of The Workmen's Compensation Act. The Workmen's Compensation Board has historically interpreted this section as permitting the payment of benefits to workmen in amounts which are proportionately higher than the actual impairment of earning capacity. It must follow that that interpretation to be truly equitable must also permit the payment of benefits which actually reflect the impairment of one's earning capacity.

Accordingly the Committee recommends that THE WORKMEN'S COMPENSATION BOARD REVOKE ITS DECISION DATED JULY 29, 1977 AND GRANT THE COMPLAINANT AN INCREASE IN HIS PERMANENT PARTIAL DISABILITY AWARD OF 20% PURSUANT TO SECTION 42 OF THE WORKMEN'S COMPENSATION ACT <sup>(6)</sup>.





SCHEDULE "A"

Office of the  
Minister

Ministry  
of  
Health

Heppburn Block  
Queen's Park  
Toronto Ontario  
M7A 2C4  
416 965-2421

June 6, 1980

Sister Margaret Smith  
Acting Chairman  
Ontario Council of Health  
14th Floor  
700 Bay Street  
Toronto, Ontario

Dear Sister Margaret:

As you know, sections 43 to 50 of The Public Hospitals Act are the statutory provisions respecting appointment of physicians to public hospital medical staffs.

On June 25, 1979, I requested the Council to report to me as to the law in other jurisdictions; the Council duly complied with that request, in its report of March 12, 1980.

I now hereby request the Council of Health to enquire into the above-mentioned provisions of The Public Hospitals Act from the point of view of

- (1) identifying what improperly discriminatory acts may flow therefrom; and
- (2) recommending any appropriate provisions which would have the effect of preventing such improperly discriminatory acts,

and to report to me thereon.

As background information, I am pleased to provide you with the following material:

1. a copy of Complaint Summary No. 45 in the Fourth Annual Report of the Ombudsman of Ontario;

2.

2. a transcript of certain proceedings of the Select Committee on the Ombudsman (August 22, 1978);
3. comments on the Ombudsman's Complaint Summary No. 45 in the Fifth Report of the Select Committee on the Ombudsman;
4. a transcript of certain proceedings of the Select Committee on the Ombudsman (March 20, 1979);
5. comments on the Ombudsman's Complaint Summary No. 45 in the Sixth Report of the Select Committee on the Ombudsman;
6. Hansard, June 21, 1979; and
7. a transcript of certain proceedings of the Select Committee on the Ombudsman (July 30, 1979).

While this material indicates the kind of concern that has resulted in my request, the Council is of course not limited or controlled by the contents of the material but may take cognizance of all considerations which it deems pertinent. Kindest regards.

Yours sincerely,

Dennis R. Timbrell  
Minister of Health





Ontario

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SCHEDULE "B"

Ministry  
of  
Health

Ontario  
Health  
Insurance  
Plan

7 Overlea Blvd.,  
Toronto, Ontario  
M4H 1A9

July 3, 1980

Mr. John P. Bell  
Counsel to the Select Committee  
on the Ombudsman  
Room 110  
Main Parliament Building  
Queen's Park  
Toronto, Ontario  
M7A 1A2

Dear Mr. Bell:

Thank you for your letter of June 10, 1980 in which you enclosed a transcript of the proceedings of the Select Committee on the Ombudsman. I believe I can respond adequately to the concerns of the Committee by letter. However, if the Committee required my attendance, I would, of course, be happy to attend.

I have grouped the questions raised during the proceedings and will respond to the concerns as I understand them. I trust this will be satisfactory.

There was some discussion of the nature of the change made to include R990 within the Schedule of Benefits. The OHIP Schedule of Benefits is prescribed as Schedule 15 of the Regulations under the Health Insurance Act. Sections 59 and 53 of the Regulations stipulate that, for physicians' services within and outside of Ontario, the amount payable by the Plan is the amount set out in Schedule 15. Code R990 was added to Schedule 15 in January 1980 which was prescribed as Ontario Regulation 120/80. I have enclosed a copy of the Schedule of Benefits. Code R990 appears on page 109, paragraph 15.

There was some discussion about whether non-surgical procedures were excluded from Code R990. The answer is yes. However, we would stretch this interpretation as far as possible to include procedures which could be accomplished by surgery or other substitute means.

...../2

Mr. John P. Bell

July 3, 1980

We believe that the standard of medicine in Ontario is very high and we feel confident that with very few exceptions all generally accepted medical procedures are available in Ontario and are included in the OHIP Schedule of Benefits. In our experience the exceptions are generally those situations where complex equipment or procedures to provide some surgical services are not yet available within the province. We have provided for these situations.

By excluding non-surgical services from Code R990, and by limiting surgical procedures to those which are described as generally accepted, we have attempted to exclude from the payment schedule services which are not considered by the medical community to be of proven medical necessity.

The question of medical necessity and the right to appeal decisions of the General Manager was raised and I would like to outline our position on this question.

Our administrative position is that where we do not have a fee prescribed, or where no provision for the establishment of a fee such as Code R990 exists, the service is not considered to be medically necessary. As a consequence we do not routinely provide claimants with a formal notice regarding the appeal procedures in such cases.

I would like to assure the Committee, however, that I believe this administrative position is appealable and that I would take no action to prevent any person indicating his or her wish to appeal this position from doing so. Such appeals are, in fact, currently being heard by the Medical Eligibility Committee and The Health Services Appeal Board.

We have had considerable difficulty in establishing a basis of payment for out-of-province claims under Code R990 which is reasonable and fair. Research into the method used in other provincial jurisdictions so far have shown a variety of approaches to this problem. For example, one province makes no extra payment over provincial rates, one pays the provincial rate plus a percentage of the difference, and a third has a means test committee. Our research is not complete as yet and I will notify the Committee through you when a policy has been established. My personal preference would be a standard basis which would apply uniformly to all patients.

Mrs. Campbell has raised a very important concern as to whether there might be ad hoc arrangements in these procedures. I believe that the approach which has been taken addresses this concern. Firstly the latitude given the General Manager under Code R990 to approve procedures not detailed in the Schedule of Benefits is narrowly defined. Secondly the adoption of a standard basis for payment will provide certainty and apply uniformly.

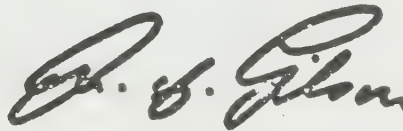
Mr. John P. Bell

July 3, 1980

The answer to the question by Mr. Eakins on Page 33 can be found in the preamble to the OHIP Schedule of Benefits (Appendix "D" page 22). This preamble clarifies the fact that although surgery solely to alter or restore appearance is not a benefit of OHIP except in very limited circumstances, surgery to alleviate significant physical symptoms or to restore or improve function to any area altered by disease, trauma or congenital deformity normally is a benefit under the Ontario Health Insurance Plan. A copy of the principal guidelines is attached.

I trust that the foregoing will be of assistance to the Committee.

Yours sincerely,

A handwritten signature in dark ink, appearing to read "M. H. Gibson", is written over a faint, circular official stamp.

M. H. Gibson  
General Manager

enclosures:





## SURGICAL PROCEDURES

- (13) Where a procedure is specified as "Independent Operative Procedure (I.O.P.)", the procedural benefit may be claimed in full. In addition, visit benefits, consultations etc. may be claimed when such services are actually rendered. When an I.O.P. procedure is done in conjunction with other non-I.O.P. procedures, there shall be no charge for the consultation, pre- and post-operative care related to the I.O.P. procedure but the listed I.O.P. benefit may be charged in these circumstances. When multiple or bilateral I.O.P. procedures are performed at the same time by the same physician, the listed procedural benefits may be claimed in full but the pre- and post-operative benefits should be claimed as if only one procedure had been performed.
- (14) When procedures are specifically listed under Surgical Procedures, physicians should use these listings rather than applying one of the plastic surgery benefits listed under operations on skin and subcutaneous tissue.
- (15) For excision of tumours not specifically listed in this Schedule, claims should be made on an I.C. basis (code R993). Independent consideration also will be given (under code R990) to claims for other unusual but generally accepted surgical procedures which are not listed specifically in the Schedule (excluding non-major variations of listed procedures).  
In submitting claims, physicians should relate the service rendered to comparable listed procedures in terms of time and difficulty (see Preamble, Part B, paragraph 20).
- (16) **Cosmetic or Aesthetic Surgery:** means a service to enhance appearance without being medically necessary such as surgery for correction of facial wrinkles, surgery for eyelid wrinkles (symmetrical and without a functional problem), rhinoplasty for appearances only, etc. These services are not benefits of OHIP. (See Preamble, Appendix A).
- (17) **Reconstructive Surgery:** is surgery to restore normal appearance and function to any area altered by disease, trauma or congenital deformity. Although surgery solely to restore appearance may be included in this definition under certain limited conditions, emotional, psychological or psychiatric grounds normally are not considered sufficient additional reason for OHIP coverage of such surgery.

Physicians should submit requests to their District OHIP office for authorization of any proposed surgery which may fall outside of OHIP coverage. Among those procedures for which requests *must* be submitted before the procedure is performed are:

- (a) augmentation mammoplasty (excluding post-mastectomy breast reconstruction)
- (b) blepharoplasty
- (c) dermabrasion (excluding face and neck)
- (d) epilation of hair
- (e) face lift
- (f) hair transplant
- (g) panniculectomy, lipectomy
- (h) reduction mammoplasty
- (i) rhinoplasty or septorhinoplasty
- (j) scar revision (excluding face and neck)
- (k) sex-reassignment surgery
- (l) tattoo removal (excluding face and neck)

## PREAMBLE

### APPENDIX D

1. Surgery to alleviate significant physical symptoms or to restore or improve function to any area altered by disease, trauma or congenital deformity normally is a benefit under The Ontario Health Insurance Plan. Surgery solely to alter or restore appearance is not a benefit of OHIP except under the circumstances as listed in the following policy.
2. Emotional, psychological or psychiatric grounds normally are not considered sufficient reason for OHIP coverage of surgery for alteration of appearance. Exceptions to this limitation, however, may be made on an independent consideration basis if the proposed surgery is to alter a significant defect in appearance caused by disease, trauma or congenital deformity, *and* if the surgery is
  - recommended by a Mental Health Facility, or
  - recommended by a Correctional Institution, or
  - essential in order to obtain employment as documented by the attending physician *and* either by a Canada Manpower Employment Centre or by an employer with regard to a specific job, or
  - performed on a patient who is less than 18 years of age and the defect is in area of the body which normally and usually would not be clothed.
3. In establishing this policy, it has been recognized that
  - peer acceptance in our society often is influenced disproportionately by the facies,
  - children are especially susceptible to emotional trauma caused by physical appearances,
  - some procedures traditionally have been accepted as benefits of Health Insurance Plans in spite of the obvious cosmetic nature of these procedures.
4. Surgery to revise or remove features of physical appearance which are familial in nature is not a benefit of OHIP.
5. Within the context of this policy, the word "disease" does not include the normal sequelae of aging. Surgery to alter changes in appearance caused by aging is not a benefit of OHIP.
6. Within the context of this policy, the word "trauma" includes trauma due to treatment such as surgery, radiation, etc.
7. The phrase "reasonable period of convalescence" admittedly is imprecise, but it does not seem reasonable to set a definite time interval of convalescence following each procedure. Independent consideration will be given to the questionable cases.
8. Authorization from OHIP is not required for all surgery to alter appearance. It is required only for those categories of procedures for which some cases may not be a benefit under OHIP policy.

#### Surface Pathology

##### 1. Trauma Scars

###### (a) Neck or Face

- Includes ears and non-hair bearing areas of the scalp.

SCHEDULE "C"

JUNE, 1980

THE OMBUDSMAN/ONTARIO

I STATISTICAL SYNOPSIS

II STATISTICAL COMPARISON  
SEVENTH REPORT/FY 79-80  
FIFTH REPORT/SIXTH REPORT/FY 78-79





SECTION I  
STATISTICAL SYNOPSIS

STATISTICAL SYNOPSIS

	<u>FY 78/79</u>	<u>FY 79/80</u>
1. <u>FILES OPENED:</u>	6498	5475

The decline of 1023 in the number of files opened is largely attributable to the fact that 1165 non-jurisdictional complaints and information requests received in the course of office and hearing interviews which did not require a file to be opened because complaints were documented as no follow-up complaints.

2. <u>FILES CLOSED:</u>	6723	4655
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The decrease of 2068 in the number of files closed results from (i) the decline of 512 in jurisdictional complaints closed because of the introduction of the administrative fairness procedures, (ii) the decline of 1165 non-jurisdictional file openings and (iii) an overall decline in the number of non-jurisdictional complaints and information requests that were received - see also #10.

3. <u>IN PROGRESS FILES:</u>	1914	2562
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The 648 increase in the number of in progress files is largely attributable to the decline of 512 in the number of jurisdictional complaints closed (see administrative fairness). Jurisdictional in progress files increased (528) from 1528 to 2056 from March 1979 to February 1980.

4. <u>JURISDICTIONAL COMPLAINTS:</u>	2866	2354
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The decrease of 512 jurisdictional closed complaints is largely due to the introduction of administrative fairness procedures - see also #2.

5. <u>NON-JURISDICTIONAL COMPLAINTS:</u>	4050	2375
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The decline of 1675 non-jurisdictional closed complaints is attributable to (i) the introduction of the no follow-up procedure - see files opened - and (ii) an overall decline in non-jurisdictional complaints received - see also #10.

6. <u>RESOLVED/ASSISTED (INVOLVED):</u>	2267	1610
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The decrease of 657 resolved complaints coincides with the reduced number of jurisdictional complaints closed - see also #2 and #4. The decline of 460 independently resolved complaints is attributable to a change in terminology from "assisted" resolution to "involvement" in the resolution. In the past many complaints were categorized as independently resolved even though there was involvement on the part of the Ombudsman.

	<u>FY 78/79</u>	<u>FY 79/80</u>
7. <u>FAVOUR COMPLAINANT/</u>	949	613
<u>FAVOUR GOVERNMENTAL ORGANIZATION</u>	1318	997

The decline of 336 complaints settled in favour of the complainant and the decline of 321 complaints settled in favour of the governmental organization is directly attributable to the reduced number of jurisdictional complaints closed - see also #2 and #4. The proportion of complaints settled in favour of the complainant versus the complaints settled in favour of the governmental organization did not change significantly.

8. <u>REFUSE TO INVESTIGATE OR</u>		
<u>FURTHER INVESTIGATE:</u>	71	169

The increase of 98 complaints wherein the Ombudsman pursuant to Section 18 of the The Ombudsman Act, 1975 decided to refuse to investigate or further investigate is attributable to an increased use of this section where there is an adequate administrative or legal remedy, for example, medical complaints from correctional facilities which may be directed to the senior medical consultant.

9. <u>AVERAGE DURATION TO CLOSING:</u>	101	153
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The increase of 52 days in the average duration to closing for complaints handled as files is largely attributable to (i) the introduction of administrative fairness procedures and (ii) the reduced number of file openings for straightforward non-jurisdictional complaints that were otherwise handled as no follow-up complaints.

10. <u>NO FOLLOW-UP COMPLAINTS AND</u>		
<u>INFORMATION REQUESTS:</u>	6058	5097

The reduced number of no follow-up complaints (961) is attributable to a general decline in the number of non-jurisdictional complaints and information requests being received by the Office. It appears that the public has gained a greater awareness of our jurisdiction. The Ombudsman film and the distribution of brochures across the Province have influenced this trend.





SECTION II

STATISTICAL COMPARISON

SEVENTH REPORT/FY 79-80  
FIFTH REPORT/SIXTH REPORT/FY 78-79

COMPLAINT DISPOSITION SUMMARY  
7TH REPORT/FY 79-80  
5TH REPORT/6TH REPORT/FY 78-79

I FILES:	5TH/6TH (FY 78/79)	7TH (FY 79/80)
OPENED	6498	5475
CLOSED	6723	4655***
IN PROGRESS	1914	2562

II COMPLAINT DISPOSITION SUMMARY:

JURISDICTION/COMPLAINTS

WITHIN JURISDICTION	2866	2354
OUTSIDE JURISDICTION	4050	2375
NOT DETERMINED	144	102
INFORMATION REQUESTS/ SUBMISSIONS	828	608
TOTAL	7888	5439***

FINAL ACTION/COMPLAINTS

LISTEN	157	283
EXPLAIN	884	453
ADVISE	676	250
REFER	1888	1131
INQUIRE/REFER	926	691
INQUIRE	3181	2348
SUGGEST	73	78
RECOMMENDATION	32	36
REFUSE TO INVESTIGATE OR FURTHER INVESTIGATE	71	169
TOTAL	7888	5439

SETTLEMENT/COMPLAINTS

RESOLVED/ASSISTED (INVOLVED)*	1750	1553
RESOLVED/INDEPENDENT	517	57
TOTAL RESOLVED	2267	1610

FINDINGS

SUPPORTED	114	108
NOT SUPPORTED	1321	998

RESULT (only resolved complaints)

FAVOUR COMPLAINANT	949	613
FAVOUR GOVERNMENTAL ORGANIZATION	1318	997
	2267	1610

NOT RESOLVED

REASONS:

ABANDONED	416	415
WITHDRAWN	330	354
NO SOLUTION IDENTIFIED	27	13
CIRCUMSTANCES CHANGED	39	13
INFORMATION REQUESTS/ SUBMISSIONS	828	608
OUTSIDE JURISDICTION	3889	2244
REFUSE TO INVESTIGATE OR FURTHER INVESTIGATE	71	169
RECOMMENDATION DENIED	21	13
TOTAL	5621	3829

AVERAGE DURATION TO CLOSING (DAYS)	101	153
------------------------------------	-----	-----

NO FOLLOW-UP COMPLAINTS AND  
INFORMATION REQUESTS

6058	5097
------	------

\*Applicable to FY 1979-80 complaints only.  
\*\*\*Some files involved more than one complaint.

COMPLAINT DISPOSITION SUMMARY

	<u>5TH/6TH</u> <u>(FY 78/79)</u>	<u>7TH</u> <u>(FY 79/80)</u>
III <u>COMPLAINTS BY ORGANIZATION:</u>		
-involved Ontario Government, Ministries or Agencies	5192	3925
-involved private agencies, firms or individuals	1244	699
-involved municipalities or local police forces	581	309
-involved Federal Government departments or agencies	441	248
-involved courts	332	206
-involved international, other provinces or unspecified	108	56
	<hr/> 7898	<hr/> 5443**

\*\*Some complaints involved more than one organization.





SCHEDULE "D"

SECTION 42-(1)

Directive 5. (1) On and after the 14th day of May, 1965 the Medical Branch is to be responsible for estimating the clinical permanent disability of injured employees including permanent injuries directly covered by the Permanent Partial Disability Rating Schedule and claims in which no award is indicated.

(2) It is the Pensions Medical Adviser's responsibility to estimate the injured employee's clinical disability which is to be based on the injured employee's medical history together with the medical examiner's findings and expressed in terms of percentage of the whole man with reference to the current Permanent Partial Disability Rating Schedule.

(a) As a general rule, persons other than the injured employee and the medical examiner or examiners are not to be present during the clinical examination.

(3) The recommended clinical permanent disability rating is to be either a permanent rating for life or a provisional rating for a period to be terminated on a definite date, the period to be decided by the medical examiner but rarely for a period of less than one year.

(a) Reassessment of every provisional award is to be at least two weeks prior to the expiration of provisional period.

(4) The industrial diseases Medical Specialist in consultation with the Consultant in Industrial Dermatology and a Pensions Adjudicator are to continue to jointly determine and make permanent awards for dermatitis.

(5) After examination, report and recommendation by the Advisory Committee on Occupational Chest Disease, awards for silicosis are determined by the Industrial Diseases and Dependents Section.

(6) Every claim involving permanent disability rating for an ear injury or for industrial deafness is to be referred to Medical Specialist, Ears, for consideration. Eye injuries to Medical Specialist, Eyes.

(7) A permanent disability pensioner has the right to request a review of his clinical rating where, since the time of the original clinical rating, a progression of the pensionable condition occurs. Where such a progression occurs, the Pensions Adjudicator may revise the award from a date considered appropriate, but such date is not to be earlier than three months prior to the date of the injured employee's request for review.

SECTION 42-(1)

(8) Where an injured employee questions the assessment of his clinical rating, the original medical examiner may confer with his medical colleagues, revise or confirm the clinical rating, or suggest that the injured employee be examined at a later date.

(9) On appeal, the clinical permanent disability rating is subject to change only by a subsequent medical examiner or on review by the Senior Pensions Medical Adviser, the Review Branch of Claims Services Division, the Appeals Adjudicator, or the Appeal Board.

(a) Where a permanent disability rating is altered in any way the claim file is always to be marked back to the Senior Pensions Medical Adviser for reference purposes.

(10) The clinical permanent disability rating is not to be influenced by extraneous factors such as the injured employee's particular occupation or other special circumstances, but account is to be taken of extraneous factors by a temporary provisional supplementary allowance.

(11) After the examination by the medical examiner, the Pensions Adjudicator is to interview the injured employee for the purpose of obtaining all relative information necessary to any increase in the clinical rating by way of temporary provisional supplementary allowance.

(a) Such temporary provisional supplementary allowance is to be reviewed at least once in every three-year period and is to bear a proportional relationship to the clinical rating, the proportion varying as the circumstances warrant.

(b) In considering such temporary provisional supplementary allowance, the Pensions Adjudicator is to satisfy himself that the following conditions apply:

(i) The injured employee is incapable and likely to remain incapable for a definite period of time following his regular occupation, and

(ii) The injured employee is incapable of following employment of an equivalent standard which is suitable to his case, and

(iii) The incapacity which the injured employee has suffered is due in whole or in part to the compensable disability.

SECTION 42(1)

Directive 1. GUIDELINES FOR THE RATING OF PERMANENT DISABILITY

RESPONSIBILITY

The Medical Branch, Medical Services Division, is responsible for the estimation of clinical impairment in injured employees. The Claims Adjudication Branch, Claims Services Division, is responsible for estimating the impairment of earnings capacity and establishing the level of post-accident permanent disability. When estimating the impairment of earnings capacity from the nature and degree of the injury and establishing the level of post-accident disability, consideration is to be given to Section 42 of the Act, as a whole and determination made, if any of the various sub-Sections apply.

ADMINISTRATION

Role Of The Permanent Disability Medical Staff

The Permanent Disability Medical Staff shall estimate the degree of clinical impairment from the nature and degree of the injury, and recommend an appropriate clinical rating in all cases except those where the rating can be established from medical reports on file, for example, finger amputations. The ratings should be expressed in terms of a percentage, in accordance with the provisions of the approved Permanent Disability Rating Schedule.

Responsibility Of Permanent Disability Medical Staff

1. The Permanent Disability Medical Staff shall be responsible for the examination of the injured employee and the recommendation of a clinical rating expressed as a percentage.
  - 1.1 As a general rule, persons other than the injured employee and the Permanent Disability Medical Physician or Examiner, should not be present during the clinical examination, except for a Chaperone and/or an Interpreter.
  - 1.2 The Permanent Disability Physician shall discuss the findings with the Pensions Adjudicator and provide a report of the examination findings for the claim file.
  - 1.3 The award shall either be permanent (duration of impairment) or provisional (a term).
    - 1.3.1 Provisional awards shall be for a term of not less than one year or more than five years.
    - 1.3.2 Provisional awards are to be reviewed on referral from the Pensions Adjudicator prior to expiry.



## SECTION 42(1)

### Role Of The Claims Pensions Adjudicator

The Pensions Adjudicator shall be responsible for ratings which can be determined from medical reports, for example, finger amputations which have no complications or other superimposed conditions. Such ratings are to be based on the approved Permanent Disability Rating Schedule.

### Responsibility Of Pensions Adjudicators

The Pensions Adjudicators shall be responsible for the application of the provisions of Section 42(5), temporary supplementary awards, in keeping with the Board approved guidelines.

The Pensions Adjudicator shall also be responsible for reviewing all recommended rating by the Permanent Disability Medical Staff.

### Permanent Disability Rating Guidelines

Subject to the above, the following points are to be taken into consideration when estimating the impairment of earnings capacity and establishing the level of post-accident disability.

2. Cases are usually considered for permanent disability assessment when optimum recovery has occurred.
  - 2.1 It is the Pensions Adjudicator's responsibility to authorize the assessment of all cases for permanent disability evaluation except those cases emanating from Appeals. The Pensions Adjudicator will consult with the Permanent Disability Medical Staff as required.
  - 2.2 The Pensions Adjudicator is responsible for the setting of a fair and equitable permanent disability earnings basis on which the amount of the permanent disability award is calculated.
  - 2.3 The Pensions Adjudicator may authorize permanent disability awards in cases of amputations of a finger or toe where there are no complications or other superimposed conditions. The rating is to be determined from the level of amputation in keeping with the approved Permanent Disability Rating Schedule.
  - 2.4 The Pensions Adjudicator is to inform the injured employee at the time of the interview of the percentage of assessed disability, the approximate dollar value of the award, the right to appeal the award and to request a review of the case because of deterioration of the compensable condition. A letter of confirmation shall be sent to the employee.



## SECTION 42(1)

- 2.5 The employer is to be informed in writing, the percentage of assessed disability and the dollar value of the award. The employer has the right to appeal.

### Resolution Of Disagreement About Recommended Rating

3. The Pensions Adjudicator must ensure that the recommended clinical rating takes into consideration all the circumstances in every case. Where there is disagreement with the recommended clinical rating, the file shall be referred to the Pensions Section Supervisor for resolution with the Permanent Disability Medical Consultant.

### Changes In Clinical Rating

4. A clinical rating may be changed as a result of:
- 4.1 A subsequent permanent disability medical examination.
  - 4.2 The recommendation of the Permanent Disability Medical Consultant or a Committee appointed by the Director of Medical Branch.
  - 4.3 An order from:
    - 4.3.1 The Claims Review Branch
    - 4.3.2 Appeals Adjudicator
    - 4.3.3 Appeal Board

### Processing Of Appeals

5. An injured employee and the employer both have the right to appeal the percentage of assessed permanent disability or the amount of the award.

### Within One Year From The Date Of Assessment

- 5.1 Where the request is received within one year from the date of assessment, the request is to be evaluated by a Pensions Adjudicator and a member of the Permanent Disability Medical Staff who may:
- 5.1.1 Confirm the quantum of the award.
  - 5.1.2 Arrange for assessment by a Senior Team who may: Increase the quantum of the award, confirm the quantum of the award.

## SECTION 42(1)

- 5.2 Any adverse pension decisions resulting from a requested review will be referred by a Pensions Adjudicator to the Claims Review Branch for review before the employee is notified..

### Beyond One Year From Date Of Assessment

- 5.3 Where the request is received beyond one year from the date of last assessment, the request is to be handled as follows:
- 5.3.1 A Pensions Adjudicator will ask the injured employee to submit an up-to-date medical report or the Pensions Adjudicator may ask the Permanent Disability Medical Staff to arrange for examination without an up-to-date report.
- 5.3.2 Where the medical report is requested, it is to be evaluated by the Pensions Adjudicator and a member of the Permanent Disability Medical Staff. They may confirm the award without further examination or arrange assessment at the Board's Offices.

### Increases In The Quantum Of Award Following Requests For Review

- 5.4 Any increase in the quantum of an award is to date from:
- 5.4.1 Three months prior to the date of the request for review.
- 5.4.2 An earlier date if such date is supported by medical evidence or,
- 5.4.3 In re-opened claims, a date supported by medical evidence.
- 5.5 With an appeal of a review conducted beyond one year of the last assessment, the procedures outlined in paragraph 5.1 apply.

### Review Subsequent To Appeal Board Decisions

- 6.1 Requests for a review received within one year of the last Appeal Board ruling on the permanent disability issue, are to be dealt with in Appeals as an Application to Reconsider.

SECTION 42(1)

- 6.2 If, within one year, subsequent to an Appeal Board ruling, the claim has been re-opened and benefits paid, requests for review or review resulting from deterioration in permanent disability, are to be dealt with by the Claims Services Division as a new issue.
- 6.3 Requests for review which do not fall within the time frame as set out under paragraph 6.1 are to be dealt with by the Claims Services Division as a new issue.

Cases Not Meeting General Criteria

7. Permanent disability cases which do not meet the general criteria should be individually judged and dealt with equitably and fairly having regard to all circumstances.

August 5th, 1980

February 12th, 1980  
4837 (#16)





SUMMARY OF RECOMMENDATIONS

1. The question, however, of whether and to what extent persons are given notice of the available appeal procedures continues to trouble the Committee. THE COMMITTEE THEREFORE RECOMMENDS THAT THE MINISTRY OF HEALTH GIVE PROMPT NOTICE TO ALL PERSONS WHOSE CLAIMS FOR BENEFITS UNDER R990 ARE IN THE FUTURE REFUSED, FULL PARTICULARS OF THE APPEAL PROCEDURES AVAILABLE TO THEM AT THE SAME TIME AS THE NOTICE OF REFUSAL IS COMMUNICATED. <sup>(1)</sup> (Page 17)

2. Accordingly, the Committee recommends that THE LEGISLATIVE ASSEMBLY APPROVE AND ADOPT THE RECOMMENDATION OF THE OMBUDSMAN AND THAT THE HOUSING AUTHORITY IN QUESTION GIVE THE COMPLAINANT AND HIS FAMILY IMMEDIATE ACCOMMODATION IN A SUITABLE GEARED TO INCOME HOUSING UNIT; AND IF A SUITABLE UNIT IS NOT AVAILABLE IMMEDIATELY, THAT THE HOUSING AUTHORITY ACCOMMODATE THE FAMILY IN THE FIRST SUCH UNIT WHICH BECOMES AVAILABLE. <sup>(2)</sup> (Page 37)

3. Further, the Committee cannot but believe that had the Ontario Housing Corporation given this housing authority more in the way of guidance respecting its decision making functions, this complaint may not have arisen. The Committee recognizes that the rules of natural justice may not strictly apply in the circumstances of this decision. However, the emerging principle of administrative fairness may very well have application to decisions of that nature. That is, housing authorities in Ontario exercising their decision making authorities in the matter of

subsidized residential accommodation, may very well have to treat applicants fairly by adhering to certain rules of substantial and procedural law. In any event, in the Committee's opinion, it is incumbent upon the Ontario Housing Corporation to give the housing authorities in Ontario more guidance and directions in the matter of decision making than that which is now found in its manuals. Accordingly, the Committee recommends that THE ONTARIO HOUSING CORPORATION IMMEDIATELY CONDUCT A REVIEW AND STUDY OF ITS MANUALS AND THE DECISION MAKING FUNCTIONS OF HOUSING AUTHORITIES IN PARTICULAR FOR THE PURPOSE OF AMENDING ITS MANUALS TO GIVE HOUSING AUTHORITIES MORE GUIDANCE IN ORDER THAT THE RULES OF ADMINISTRATIVE FAIRNESS WILL BE MORE STRICTLY ADHERED TO. <sup>(3)</sup> (Page 37/38)

4. In accordance with the Committee's motion, the Committee recommends that THE WORKMEN'S COMPENSATION BOARD REVOKE ITS DECISION DATED AUGUST 30, 1977 AND EXTEND TO THE COMPLAINANT THE BENEFIT OF REASONABLE DOUBT TO GRANT ENTITLEMENT FOR AN INCIDENT ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT ON APRIL 9, 1976 WHICH AGGRAVATED A PRE-EXISTING BACK CONDITION AND AWARD THE APPROPRIATE COMPENSATION BENEFITS. <sup>(4)</sup> (Page 46)

5. Therefore, the Committee recommends that THE WORKMEN'S COMPENSATION BOARD VARY ITS DECISION DATED JANUARY 12, 1978 AND GRANT THE COMPLAINANT TEMPORARY DISABILITY BENEFITS FROM THE DATE OF HIS ACCIDENT (OCTOBER 3, 1975) UNTIL SUCH TIME AS MEDICAL EVIDENCE INDICATES THAT THE COMPLAINANT'S CONDITION IS STABILIZED.

AT THAT TIME THE COMPLAINANT SHOULD THEN BE GRANTED A PERMANENT DISABILITY AWARD IN AN AMOUNT TO BE DETERMINED BY THE WORKMEN'S COMPENSATION BOARD. <sup>(5)</sup> (Page 50)

6.           Accordingly the Committee recommends that THE WORKMEN'S COMPENSATION BOARD REVOKE ITS DECISION DATED JULY 29, 1977 AND GRANT THE COMPLAINANT AN INCREASE IN HIS PERMANENT PARTIAL DISABILITY AWARD OF 20% PURSUANT TO SECTION 42 OF THE WORKMEN'S COMPENSATION ACT. <sup>(6)</sup> (Page 55)









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# **NINTH REPORT OF THE SELECT COMMITTEE ON THE OMBUDSMAN**

**1981**

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First Session, Thirty-Second Parliament  
30 Elizabeth II





December 1981

THE HONOURABLE JOHN M. TURNER  
Speaker of the Legislative Assembly  
of the Province of Ontario

Sir,

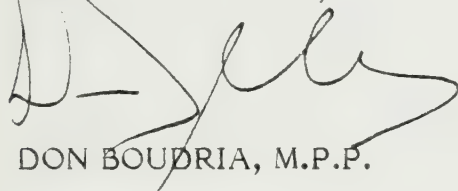
We, the undersigned members of the Committee appointed by  
the Legislative Assembly of the Province of Ontario on Thursday, July 2, 1981,  
have the honour to submit the attached ninth report.



ROBERT W. RUNCIMAN, M.P.P.  
Chairman



PHILIP ANDREWES, M.P.P.



DON BOUDRIA, M.P.P.

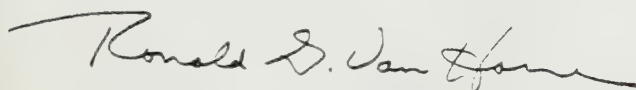


GORDON DEAN, M.P.P.

MORLEY KELLS, M.P.P.



ED PHILIP, M.P.P.



RONALD G. VAN HORNE, M.P.P.



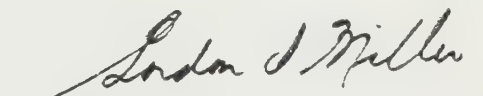
BILL BARLOW, M.P.P.



DAVID COOKE, M.P.P.



ERNIE EVES, M.P.P.



GORDON I. MILLER, M.P.P.



YURI SHYMKO, M.P.P.



MEMBERS OF SELECT COMMITTEE  
ON THE  
OMBUDSMAN

ROBERT W. RUNCIMAN, M.P.P.	Leeds
PHILIP ANDREWES, M.P.P.	Lincoln
BILL BARLOW, M.P.P.	Cambridge
DON BOUDRIA, M.P.P.	Prescott-Russell
DAVID COOKE, M.P.P.	Windsor-Riverside
GORDON DEAN, M.P.P.	Wentworth
ERNIE EVES, M.P.P.	Parry Sound
MORLEY KELLS, M.P.P.	Humber
GORDON I. MILLER, M.P.P.	Haldimand-Norfolk
ED PHILIP, M.P.P.	Etobicoke
YURI SHYMKO, M.P.P.	High Park Swansea
RONALD G. VAN HORNE, M.P.P.	London North

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JOHN P. BELL	Counsel to the Committee
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GRAHAM WHITE	Clerk of the Committee
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## NINTH REPORT OF THE SELECT COMMITTEE ON THE OMBUDSMAN

### Part I Introduction

On the 2nd day of July, 1981, on motion by Mr. Wells, seconded by Mr. Norton, the Legislature ordered,

"That a Select Committee on the Ombudsman be appointed to review and consider from time to time the Reports of the Ombudsman as they become available and as the Committee deems necessary, pursuant to Section 16(1) of The Ombudsman Act, 1975; formulate from time to time general rules for the guidance of the Ombudsman in the exercise of his functions under The Ombudsman Act; to report thereon to the Legislature and to make such recommendations as the Committee deems appropriate. Further, the Committee may, with the agreement of the Legislature, be permitted to sit concurrently with the Legislature from time to time; And that the Select Committee have authority to sit during recesses and the interval between Sessions and have full power to employ such staff as it deems necessary and to hold meetings and hearings in such places as the Committee may deem advisable, subject to budget approval from the Board of Internal Economy, and to call for persons, papers and things and to examine witnesses under oath, and the Assembly doth command and compel the attendance before the said Committee of such persons and the production of such papers and such things as the Committee may deem necessary for any of its proceedings and deliberations for which the Honourable the Speaker may issue his warrant. The said Select Committee to consist of 12 members, to be named on motion before the House adjourns for the summer."

On the 16th of July, 1981 the Committee held its organizational meeting whereupon it prepared its schedule of activities for the balance of the year and re-appointed as its counsel Mr. John P. Bell.

The Committee met for two weeks in September during which time it considered and deliberated upon the all of the matters set out in this Ninth Report. The Committee wishes to extend its appreciation to the Ombudsman, his staff and representatives of the various governmental organizations who appeared before it, for their able advice and assistance.

The Legislature debated the Eighth Report of the Select Committee on the 14th of May, 1981. For the very first time it decided not to accept a recommendation from the Committee. In this instance the Committee supported a recommendation made by the Ombudsman in a report to the Workmen's Compensation Board, to the effect that the Board alter its interpretation and application of Section 42(1) (now 43(1)) of the Workmen's Compensation Act.

The Honourable Mr. Robert Elgie, Q.C., Minister of Labour, informed the Legislature, during the debate on May 14, 1981, that the Board and his own Ministry had each obtained legal opinions with respect to the interpretation of Section 42(1) of the Workmen's Compensation Board Act. The Minister advised the Legislature with regret that the legal opinions disagreed not only with the opinion of the Ombudsman but with the opinion of the Select Committee in respect of the appropriate interpretation of Section 42(1). Apparently on that ground alone, the Minister declined to accept the Committee's recommendation and his position was ultimately supported by the Legislature.

As a matter of general principle, the Committee does not consider that a single decision of the Legislative Assembly to reject such a recommendation of this Committee will undermine the Ombudsman's authority and effectiveness. However, the Committee believes that such a decision by the Assembly should only be taken in exceptional circumstances and only when, after a full debate has occurred, the Legislature is able to conclude that the implementation of the Committee's recommendation would, in the circumstances, be contrary to the public interest or be contrary to some generally recognized principle of law.



The process that has developed between this Committee and the Legislative Assembly respecting Ombudsman recommendations requires that all relevant Committee recommendations be adopted by the Legislature unless some substantive reason to the contrary can be shown. It is absolutely vital to the continuing viability and effectiveness of the Ombudsman's process that this be so. If a situation were permitted to develop whereby rejection of such Committee recommendation were the norm, or were made for some capricious reason, the Ombudsman's effectiveness in the eyes of the governmental organizations and the people of the Province of Ontario would be irreparably harmed.

The Committee accepts the decision of the Legislature on this matter. However, the Committee is concerned that the consequences flowing from that decision, insofar as the Ombudsman and certain citizens of Ontario whom he has served are concerned, are such that further steps must be taken. Those steps are more fully set out at pages 35 to 38 hereafter.

This report represents the first opportunity since the opening of the 32nd Legislature, that the Committee has had to express its views to the Assembly on matters such as the organization and operation of the Ombudsman's office, the working relationships between the Ombudsman and governmental organizations and the relationship between the Ombudsman, this Committee and through it, the Legislative Assembly.

In previous reports, the Committee has made statements of principle concerning these matters. Since in many ways this Committee is "new", it feels it is

appropriate at this time to restate some of these principles and to reaffirm its support for their continuation.

"The Committee has historically functioned as more than an information source to the Legislative Assembly respecting the organization and operation of the "Ombudsman concept" in Ontario. It has served as a liaison and catalyst in the establishment, maintenance and improvement of the relationships between the Ombudsman and the many governmental organizations within his jurisdiction. It has also served as a means of implementing matters outstanding between the office of the Ombudsman and governmental organizations. It has been acknowledged by most who have come into contact with it as an effective instrument in the overall concept of an Ombudsman in the Province of Ontario. To ignore the Committee's efforts and Reports only served to demean the concept of the Ombudsman in Ontario, the role and function of Select Committees of the Legislature, and the legislative process generally.

Unless our Ombudsman has access, directly or indirectly, to the Legislative Assembly, to seek support for any of his recommendations, he will not be fully effective in his office. Where it is appropriate and where the circumstances so warrant, unless the Legislative Assembly is prepared to give full support to the Ombudsman's recommendations, then it is paying mere lip service to the concept of the Ombudsman in Ontario. Without such support of the Legislature, the Ombudsman is reduced to a reporter and record-keeper of complaints.

To paraphrase a legal maxim, to be fully effective, the Ombudsman must be seen to perform his functions. What better place than the forum of the Legislative Assembly to demonstrate to the people of the Province of Ontario that the Ombudsman operates and is effective at every level of his function." (Sixth Report of the Select Committee, Introduction, pages III-IV.)

"The Committee believes that the Order of the Legislature on the 21st of June, 1979 adopting its Sixth Report and the support for both the Office of the Ombudsman and this Committee expressed by members of all three parties at that time, has elevated the office of the Ombudsman in this province, to a new level of effectiveness.

The Legislature has now demonstrated to the Ombudsman, the governmental organizations under his jurisdiction and to the people of the Province of Ontario, that in the appropriate circumstances the Legislative Assembly of the Province of Ontario will do everything within its competence to see that the Ombudsman's recommendations are implemented.

At the same time the Committee is mindful that the debate and consideration of its Sixth Report on the 21st of June, 1979 dealt more with expressions of support for the Committee's recommendations and the concept of Ombudsman rather than dealing in detail with the substantive issues raised by the recommendations. The Committee realizes the great burden and responsibility this places upon it during its deliberations wherein Legislative support is sought by the Ombudsman for one or more of his recommendations. The Committee wishes to assure the Legislature that it will continue to investigate exhaustively and review all aspects of Ombudsman reports before reporting thereon to the Legislature, particularly on matters of Ombudsman recommendations. This process will ensure that the Legislature, through this Committee, before effectively approving and adopting a recommendation of the Ombudsman will have fully investigated, examined and thoroughly reported upon all relevant and appropriate issues.

This Committee is now confident that a procedure has been attained whereby the Ombudsman can attempt to invoke his "ultimate sanction" in such situations wherein a governmental organization has neglected or refused to implement a recommendation made by him in one of his reports." (Seventh Report of the Select Committee, Introduction, pages II - IV)

"On the 22nd day of November, 1979 the Committee's Report on motion by Government House Leader, The Honourable Thomas Wells, was considered by the Committee of the Whole House. The Legislative Assembly then received and considered the Report of the Committee of the Whole House which Report concurred in the 17 recommendations contained in the Committee's Seventh Report. Thereupon the Legislature ordered that the Seventh Report of the Select Committee be received and adopted.

This process further entrenched the commitment of the Legislative Assembly of the Province of Ontario and this Select Committee to the Ombudsman and the functions which he and the office perform for the people of the Province of Ontario. Against the background of that commitment the Committee reminds everyone of the following as expressed in the Seventh Report:

"This Committee is now confident that a procedure has been attained whereby the Ombudsman can attempt to invoke his "ultimate sanction" in such situations wherein a governmental organization has neglected or refused to implement a recommendation made by him in one of his reports. As will be discussed later in this Report (See pages 1 to 9), there is some disagreement among members of the Legislative Assembly as to the legal force and effect of an Order of the Legislative Assembly adopting one of this Committee's reports.



The weight in law that an Order of the Legislature adopting a Select Committee's report and recommendation is, in the Committee's opinion, not the critical issue in this discussion. That critical issue is best expressed by the Attorney General in a letter to the Chairman of this Committee dated July 4th, 1979 as to what is "the best way to implement recommendations of the Ombudsman and the Select Committee.". Certainly the discussion should not be centered upon the possible consequences of a failure or refusal to implement such recommendations, but upon the "best way" that the governmental organizations affected thereby are to implement those recommendations.

The Committee hopes that any governmental organization affected by such a recommendation adopted, by the Legislature, would be loathe not to implement that recommendation as quickly as possible. If that were not the case it would have a serious undermining effect on the integrity of the Legislature and the respect which all governmental organizations must have therefor. Certainly any governmental organization who embarks upon a technical "word game" with respect to the legal effect of the legislative action is demonstrating a profound disrespect for both the concept of the Ombudsman in the Province of Ontario and the Legislative Assembly."

In general terms, governmental organizations which have been affected by recommendations of this Committee, adopted by Order of the Legislative Assembly have complied with those recommendations without debate on the nature and extent of their legal obligation so to do. Such compliance is the only way that the Ombudsman in Ontario can meaningfully serve the people. If every recommendation issued by this Committee and adopted by Order of the Legislative Assembly was subjected to a legal debate on the legal obligation of the governmental organization to comply, the entire process would grind to a halt and the office of the Ombudsman would not be viewed as an institution created for the ultimate benefit of the people of Ontario.

The Committee recognizes that there will be occasions when a governmental organization will continue to disagree with the substance of an Ombudsman report and recommendation, which the Legislative Assembly has by Order approved and adopted with the assistance of this Committee. Where those occasions arise the Committee urges the governmental organizations affected to comply with the Committee's recommendation expeditiously as they would any other legal obligation. To do otherwise will be to cause unnecessary strain on the entire process involving the Ombudsman, this Committee and the Legislative Assembly. To do otherwise would undermine the work of the Legislative Assembly and the democratic process represented thereby.

These occasions when they arise, represent the reality of the Ombudsman process in the Province of Ontario. This reality deserves



continued support by all those affected thereby - by the Committee, in fulfilling its terms of reference as particularly expressed in the introduction of its Seventh Report; by the Legislative Assembly of the Province of Ontario in giving the Select Committee's reports full and serious consideration and debate and ultimate adoption by Order; and by the governmental organizations in question which must recognize that once the Legislative Assembly has "spoken" in the form of an Order adopting a report of the Select Committee, they must immediately as the circumstances permit comply therewith without further question." (Eighth Report of the Select Committee, Introduction, pages I-III.)

Before it commenced its formal hearings, the Committee members met with the Ombudsman and senior members of his staff at the Ombudsman's new facilities. The Committee, and especially its new members, wished to observe and assess first hand the organization and operation of the Ombudsman's office.

The session was most productive and valuable. Committee members exchanged views with the Ombudsman and his staff respecting such critical issues as the back log of cases, quality of investigations and the need for continuous and effective communications with complainants.

The Committee was particularly assisted by the insights offered by the Ombudsman during the session. It believes that it would be greatly assisted especially during its continuing learning period, if in the future the Ombudsman were present during all of its public proceedings wherein matters which relate to the organization and operations of his office are considered. The Committee intends to implement this arrangement with the Ombudsman in time for its next proceedings.

The Ombudsman is of the opinion that his office ranks as the best such operation in the world. In the Committee's opinion this may very well be the case in

terms of organization, quality of investigation and quality of staff. However, the fact remains that some people in Ontario who have sought the assistance of the Ombudsman's office do not feel well served in terms of the length of time taken to conduct investigations and to reach conclusions on their complaints.

The Committee is mindful that the Ombudsman should not only strive to serve complainants expeditiously but to serve them well. These competing interests have confronted the Ombudsman and his staff since the inception of the office and have been the subject of numerous discussions with this Committee.

The Committee shares the Ombudsman's view that his office is "first class". Its procedures are efficient. Its investigations are thorough. Its reports are well documented, well written and comprehensive. The Ombudsman's decisions, as found in his Section 22, reports are objective and based upon material facts as disclosed by the investigation.

However, the Committee is of the opinion that further steps can and should be taken to decrease the time required to process complaints. Only when that has been done will the frustrations that some persons in this province still feel be diminished.

These comments should not be taken by the Ombudsman or his staff as harsh or unfair. The office may very well rank among the best in the world. As such this committee and the Legislature is entitled to expect that this high standard is maintained and even improved upon. The Ombudsman should require no less for the people that he serves ultimately - the people of the Province of Ontario.

Part II Matters Pending at the Dissolution of the 31st Legislature

A. Resolution of the Legislative Assembly dated May 29th, 1980

On the 29th of May, 1980, the Legislative Assembly passed resolution put forward by Mr. James Renwick, Q.C., M.P.P.:

"That this Assembly request the Select Committee on the Ombudsman to consult with the United Nations Commission on Human Rights, Amnesty International and the International Commission of Jurists and others, if advisable, with a view to reporting to this Assembly on ways in which this Assembly may act to make its voice heard against political killings, imprisonment, terror and torture."

The Committee in its eighth report advised the Assembly that it intended to meet with a number of other groups and individuals beyond the three mentioned in the resolution. However, the Committee's work in this regard was not complete when the Legislature was dissolved.

The Committee is of the opinion that the work started by its predecessor committee should and must be completed to give full effect to the resolution passed by the House in May of 1980. The Committee concurs wholeheartedly with the resolution and with the work which the Committee had completed up to dissolution.

Strictly speaking, the completion of the task outlined in this resolution is beyond the Committee's original terms of reference. For this reason it obtained approval of the Legislature on October 13, 1981 to complete the work of its

predecessor committee. The Committee intends to complete this matter and report to the Legislature before the end of the Spring sitting.

B. Communications from the Public

The Committee continues to receive and consider communications from members of the public. Many of these communications include comments respecting the organization and operation of the Ombudsman's office and requests for opportunities to appear before the Committee to elaborate on those comments.

As the Committee has stated in its previous reports, it will continue to receive and consider these communications. However, it will only invite comments in person if it considers that the subject matter raised in the communication is such that would assist the Committee in carrying out any part of its term of reference.

With one exception, the communications received by the Committee to the middle of September, 1981, did not contain anything which would have assisted the Committee in the manner as described. The one exception will be dealt with by the Committee when it next holds its hearings.

The Committee notes that a number of the communications received from the public deal with comments and concerns expressed respecting the Ombudsman's investigative and related procedures concerning a particular complaint which, as of the date of the communication to the Committee, had not been finally investigated or resolved by the Ombudsman. Generally, the Committee considers



these types of communications to be premature. As a matter of general policy the Committee will not consider a concern of a complainant before the Ombudsman has issued a report or taken other appropriate steps pursuant to the Ombudsman Act. Any comments or concerns at that stage should be addressed to the office of the Ombudsman for discussion and, if possible, resolution.

Part III Eighth Report Of The Select Committee

(a) Comments and responses of the Ombudsman

In its Eighth Report the Committee expressed some concern over the length of time required by the Ombudsman and his office to process complaints, particularly involving the Workmen's Compensation Board. The Ombudsman has since reported that as a result of an intense effort by his staff and the addition of some contract investigators, the backlog of cases, most notably in the Workmen's Compensation Board area, has been significantly reduced to a level so that it should take no more than 12 months to fully process an average Workmen's Compensation Board file. Apparently the approximate work load of cases is in the 350 range or an average of 35 cases per investigator.

Given 35 as the average investigator's work load and 12 months as the average duration, then the Ombudsman's office will expend slightly more than 1.3 weeks of a person's time on each file. Expressed in the terms of the average work week, the total time expended on each file would fall between 50 and 60 hours.

Given the type of Workmen's Compensation Board cases which have been reviewed by the Committee since its inception, this average time spent would seem to be high. The Committee recognizes that there will be "down time" associated with that average. However, even making such an allowance, the total time still appears to be high.

These comments should not be taken by the Ombudsman and his staff to be a deliberate attempt to interfere with the organization and operation of the

office. They are rather intended to assist the Ombudsman in assessing and wherever necessary re-organizing his staff and work load to accommodate the concern that everyone shares - that the average duration to process a file to completion is still much too high.

(b) Responses from Governmental Organizations to  
Recommendations Contained in the Select Committee's Eighth Report

1. Ministry of Health

Recommendation No. 1 - Eighth Report of Select Committee,  
Complaint No. 21, Ombudsman's Sixth Report

At page 17 of its Eighth Report the Committee recommended that,

"the Ministry of Health give prompt notice to all persons whose claims for benefits under R990 are in the future refused, full particulars of the appeal procedures available to them at the same time that the notice of refusal is communicated."

The Committee was advised by the director of the Professional Services Branch of the Ministry of Health that while the recommendation has been implemented to a certain degree, it has not been made to apply to decisions of OHIP denying entitlement on the grounds that the procedure is available somewhere in Ontario and on the grounds that the procedure is not considered surgical in nature.

In the Committee's opinion it would be overly restrictive to limit the appeal procedures contemplated by Recommendation No. 1 in its Eighth Report, to the two areas identified by the Ministry. Certainly, all issues arising out of the consideration by OHIP of whether and/or to what extent coverage is available under that part of the code should be appealable.

Therefore, THE COMMITTEE RECOMMENDS THAT ALL DECISIONS MADE BY OHIP IN RESPECT OF ANY CLAIM MADE FOR BENEFITS PURSUANT TO CODE R990 (NOW R991) BE SUBJECT TO THE APPEAL PROCEDURES SET OUT IN THE GENERAL MANAGER'S DIRECTIVE DATED MAY 21ST, 1981 AND THE MEMORANDUM OF THE DIRECTOR OF THE PROFESSIONAL SERVICES BRANCH DATED AUGUST 17, 1981 (SCHEDULE A).<sub>1</sub>.

2. Ministry of Housing

Recommendations Nos. 2 and 3 of the Committee's Eighth Report,  
Complaint No. 17, Ombudsman's Seventh Report

At page 37 of the Committee's Eighth Report it stated that,

"In the Committee's opinion, the actions of the housing authority in question were not consistent with its rights and responsibilities as articulated by the Order-In-Council and the Ontario Housing Corporation Field Manual. The reasons given by the Ombudsman in support of his opinion and recommendations are overwhelming when compared to the reasons provided by the housing authority for its decision to indefinitely defer the housing of the complainant and his family.

Accordingly, the Committee recommends that THE LEGISLATIVE ASSEMBLY APPROVE AND ADOPT THE RECOMMENDATION OF THE OMBUDSMAN AND THAT THE HOUSING AUTHORITY IN QUESTION GIVE THE COMPLAINANT AND HIS FAMILY IMMEDIATE ACCOMMODATION IN A SUITABLE GEARED TO INCOME HOUSING UNIT; AND IF A SUITABLE UNIT IS NOT AVAILABLE IMMEDIATELY, THAT THE HOUSING AUTHORITY ACCOMMODATE THE FAMILY IN THE FIRST SUCH UNIT WHICH BECOMES AVAILABLE .

Further, the Committee cannot but believe that had the Ontario Housing Corporation given this housing authority more in the way of guidance respecting its decision making functions, this complaint may not have arisen. The Committee recognizes that the rules of natural justice may not strictly apply in the circumstances of this decision. However, the emerging principle of administrative fairness may very well have application to decisions of that nature. That is, housing authorities in Ontario exercising their decision making authorities in the matter of subsidized residential accommodation, may very well have to treat applicants fairly by adhering to certain rules of substantial and procedural law. In any event, in the Committee's opinion, it is incumbent upon the Ontario Housing Corporation to give the housing authorities in Ontario more guidance and directions in the matter of decision making than that which is now found in its manuals. Accordingly, the



Committee recommends that THE ONTARIO HOUSING CORPORATION IMMEDIATELY CONDUCT A REVIEW AND STUDY OF ITS MANUALS AND THE DECISION MAKING FUNCTIONS OF HOUSING AUTHORITIES IN PARTICULAR FOR THE PURPOSE OF AMENDING ITS MANUALS TO GIVE HOUSING AUTHORITIES MORE GUIDANCE IN ORDER THAT THE RULES OF ADMINISTRATIVE FAIRNESS WILL BE MORE STRICTLY ADHERED TO."

The Committee was advised that in respect of Recommendation No. 2 the family in question has accepted an offer of accommodation and it is believed they will take occupancy on or before the 1st of December, 1981.

With respect to Recommendation No. 3, the General Manager of Ontario Housing Corporation advised that the Corporation is currently reviewing its adjudication manuals and that all appropriate amendments referable to the decision making process and appeal procedures would be effective by the end of this year. Accordingly, the Committee defers any further comment and consideration of the Corporation's response to this recommendation until it has received and reviewed the field manuals as amended. The Committee intends to confer with the Ministry of Housing officials during its next proceedings and will comment in more detail in its next report.

3. Workmen's Compensation Board

Recommendation No. 4 of the Committee's Eighth Report,  
Complaint No. 19, Ombudsman's Seventh Report

The Workmen's Compensation Board had already implemented this recommendation before the Committee's Eighth Report was finalized and tabled in the Legislature. Once again the Committee commends the Workmen's Compensation Board for its prompt action in this matter.

Recommendation No. 5 of the Committee's Eighth Report,  
Complaint No. 28, Ombudsman's Seventh Report

At page 50 of its Eighth Report the Committee recommended that,

"the Workmen's Compensation Board vary its decision dated January 12th, 1978 and grant the complainant temporary disability benefits from the date of his accident (October 3, 1975) until such time as medical evidence indicates that the complainant's condition is stabilized. At that time the complainant should then be granted a permanent disability award in an amount to be determined by the Workmen's Compensation Board."

The Minister of Labour responded in the Legislature on May 14th, 1981 and advised that the Board had accepted the recommendation and would implement it in due course. The Committee was subsequently advised that the recommendation had been implemented to the satisfaction of the Ombudsman.

Recommendation No. 6 of the Committee's Eighth Report,  
Complaint No. 30, Ombudsman's Seventh Report

At pages 50 to 55 inclusive of its Eighth Report the Committee reviewed this matter in detail:

"This is a complaint made against a decision of the Workmen's Compensation Board dated the 29th of July, 1977 which denied the complainant's claim for entitlement to increased permanent partial disability benefits. The Board denied increased benefits on the grounds that the evidence presented at the hearing would not substantiate the contention that the complainant's condition had deteriorated since the original assessment.

On the 24th of November, 1972 the complainant, during the course of his employment twisted his back while using a sledge hammer. He was treated for lumbo sacral strain as aggravating a pre-existing degenerative disc disease. The complainant received a series of treatments and assessments until April 1974 when he was granted a 20% permanent partial disability award. The complainant has been unable to return to his previous type of work in view of the compensable injury. In 1976 the Workmen's Compensation Board re-assessed the injury and at that time confirmed the 20% award. Since that time the complainant has endeavoured to have the pension increased on the grounds that the condition has deteriorated since the original pension assessment.

The Ombudsman's investigation centered on the nature and extent of the medical opinions available referable to the complainant's condition since the initial assessment in 1974. In the Ombudsman's opinion the medical reports of two doctors, one an orthopaedic specialist, supported the complainant's contention that his disability had in fact deteriorated since that date. The Committee notes, however, that the opinion of the orthopaedic specialist does not state categorically that the condition had deteriorated or that an increased pension award was appropriate.

The question of the nature and extent of the deterioration suffered by this person since 1974 is, in the opinion of the Committee, rather academic. What is more significant is the conclusion reached by the Ombudsman after his investigation that the impairment to the complainant's earning capacity due to his accident had been substantial. He expressed his view to the Workmen's Compensation Board that on the facts of this case the impairment caused to the complainant's earning capacity as a result of the compensable accident is more than 20% even if assessed on an aggravation basis. He formed the opinion that the decision of the Appeal Board dated July 29, 1977 to deny the complainant an increased permanent disability award was unreasonable. He recommended pursuant to Section 22(3)(g) of The Ombudsman Act, 1975 that the Appeal Board revoke its decision and grant the complainant an increase in his permanent partial disability award of 20% pursuant to Section 42 of The Workmen's Compensation Act.

The Workmen's Compensation Board declined to implement the Ombudsman's recommendation essentially on two grounds. Firstly, the prevailing medical opinions did not support a deterioration of the complainant's low back disability. In fact the Board relied on some evidence to suggest that the condition has improved since 1974.

Secondly, the Board declined to employ the provisions of Section 42 of The Workmen's Compensation Act in this case on the grounds that it did not recognize that the impairment of earning capacity was significantly greater than is usual for the nature and degree of the injury suffered and that the complainant had removed himself from the labour market and declared himself totally disabled.

In this case, the Ombudsman and the Workmen's Compensation Board have joined issue on the interpretation of Section 42 of The Workmen's Compensation Act and in particular Section 42(1) which is as follows:

"42.-(1) Where permanent disability results from the injury, the impairment of earning capacity of the workman shall be estimated from the nature and degree of the injury, and the compensation shall be a weekly or other periodical payment during the lifetime of the workman, or such other period as the Board may fix, of a sum proportionate to such impairment not exceeding in



any case the like proportion of 75 per cent of his average weekly earnings during the previous twelve months or such lesser period as he has been employed."

The Ombudsman interprets that section as permitting the Workmen's Compensation Board to estimate the impairment of earning capacity on the basis of any and all relevant evidence. The Workmen's Compensation Board on the other hand does not believe it has the discretion to make any award under this section beyond a clinical assessment made by duly qualified medical practitioners. In other words, the Board interprets the section as creating an inextricable link between the assessment of the nature and degree of the injury and the impairment of earning capacity. The Ombudsman on the other hand is of the opinion that any estimate of the impairment of earning capacity is not solely tied to any physical assessment of the injury and sequelae.

The Committee is unable to support the recommendation of the Ombudsman to the extent that that recommendation relies upon available medical opinions for the conclusion that the condition of the complainant has deteriorated since 1974. However, as the Committee understands the Ombudsman's position, it is not necessary for there to have been any deterioration in order for the Board to implement the recommendation by increasing the pension benefits to the complainant.

The critical issue therefore is whether, having regard to the injury suffered by the complainant and the symptoms occasioned thereby, the complainant has suffered an impairment of earning capacity disproportionate to the nature and extent of the injury suffered.

The interpretation placed on all of Section 42 of The Workmen's Compensation Act by the Workmen's Compensation Board makes no provision for a workman in Ontario to receive a disability payment for an impairment of earning capacity greater than otherwise might be expected, on an indefinite basis where that workman, because of the injuries and the disability and degree of impairment is effectively removed from the work force. In the Committee's opinion this anomaly only exists because of the Board's interpretation of Section 42(1), that is, impairment of earning capacity is dictated by clinical assessment of the nature and degree of the injury. In support of its interpretation of Section 42(1), the Workmen's Compensation Board provided the Committee with a directive dated January 29, 1980 on the extent and limits of that section. This directive appears to represent a distillation of the Board's practice in dealing with cases coming within the section. This directive was also available to the Board when it formulated its responses to the Ombudsman's recommendation.



This directive and Sections 10 and 11 in particular (see Schedule "D") totally contradict the interpretation of Section 42(1) that the Board has publicly articulated from time to time. It clearly establishes that any assessment of benefit relative to impairment of one's earning capacity is not inextricably tied to a clinical assessment but may be derived from a number of sources more particularly enumerated in Section 11 of the directive.

The Committee gave the Board an opportunity to make further submissions to it respecting the interpretation and application of Section 42(1) of The Workmen's Compensation Act. On August 22, 1980 the Committee received the further submissions. The Committee understands that the directive (Schedule "D") had been rescinded subsequent to its review by the Committee.

This additional information provided and in particular the guidelines for the rating of permanent disabilities approved by the Board on February 12, 1980 (see Schedule "E") again confirms that disability awards made under Section 42(1) are not inextricably tied to the nature and extent of the clinical assessment of the nature and extent of the injury. Under the heading "Cases Not Meeting General Criteria" of guidelines Section 7 provide that:

"Permanent disability cases which do not meet the general criteria should be individually judged and dealt with equitably and fairly having regard to all circumstances."

There is no requirement in the directive or in fact in the legislation which ties benefits under this section solely to the clinical assessment of the injury.

The Committee supports the recommendation of the Ombudsman particularly as it relates to his interpretation of Section 42(1) of The Workmen's Compensation Act. The Workmen's Compensation Board has historically interpreted this section as permitting the payment of benefits to workmen in amounts which are proportionately higher than the actual impairment of earning capacity. It must follow that that interpretation to be truly equitable must also permit the payment of benefits which actually reflect the impairment of one's earning capacity.

Accordingly the Committee recommends that THE WORKMEN'S COMPENSATION BOARD REVOKE ITS DECISION DATED JULY 29, 1977 AND GRANT THE COMPLAINANT AN INCREASE IN HIS PERMANENT PARTIAL DISABILITY AWARD OF 20% PURSUANT TO SECTION 42 OF THE WORKMEN'S COMPENSATION ACT." (end of quotation from Eighth Report.)

However, during the Legislative debate on the report the Minister advised that neither he nor the Board could accept the recommendation of the Committee on the grounds as set out earlier. The Committee's comments on the decision of the Legislature are set out in the Introduction, pages 2 and 3, and in part IV, pages 35 to 38.

Part IV Eighth Report of the Ombudsman, April 1980 to March 31st, 1981

(a) Statistical Analysis

At page 18 of its Eighth Report the Committee expressed certain concern in that,

"the number of 'in progress' files has increased during a period wherein the number of files opened has decreased."

The Committee was referring to a comparative analysis of the Ombudsman's statistics for fiscal year 1979-80 and for fiscal year 1978-79.

In the fiscal period April 1980 to March 1981, the Ombudsman was able to reverse the trend in that the number of in progress files decreased by 1,080 although the number of file openings again decreased by 1,453. Certain administrative changes respecting file openings and a reduction in the number of private hearings have been offered as explanation for the reduction. During the current fiscal period the number of files in progress was reduced from 2,714 to 1,634.

Once again the duration taken to close a file has increased. On a comparative basis this duration has increased from 153 days in the previous fiscal period to 207 days in the current period. It is also significant that this duration has increased from 101 days in the fiscal period 1978-79. In other words the statistical duration has increased by over 100% within the span of 24 months.

One of the significant reasons offered by the Ombudsman as to the ever increasing durations are the administrative changes made in the file and complaint handling procedures which has had an effect of "weeding out" complaints and files which are closed within a relatively short period of time. The overall effect of these continuing administrative changes has been to make the statistics for each given year relevant primarily to those complaints wherein all or most of the Ombudsman's functions are exercised. In other words, the statistical analysis now, more than ever, reports upon activities of the office which most represent the Ombudsman's functions.

The Committee is not able to accept as a full explanation, that administrative changes vis a vis file openings and closings have resulted in the statistical increase of an average file's duration by over 100% in the last two fiscal periods.

Representatives of the Ombudsman's office were frank to admit that the staff as presently organized can not effectively cope with any real increase in the number of in progress files. In other words, the Ombudsman's office is vulnerable to an increase in workload at the expense of effective service.

In the Committee's opinion the steady increase in the duration of files must in part be attributed to the extremely heavy workload imposed upon the Ombudsman's investigative staff. The Ombudsman should undertake such steps as are appropriate to reduce that workload, either by increasing the complement of investigators within the office or of devising new procedures to apportion the workload more equitably among all members of his staff.



(b) Regional Offices

The Ombudsman has two regional offices, one in Thunder Bay and the other in North Bay. These offices have had the desired effect of making the office of the Ombudsman more accessible to the people of northern Ontario and have yielded net savings to the office in the cost of processing complaints from northern Ontario.

The Committee intends, within the next twelve months to visit both of these regional offices to assess, at first hand, their role within both communities in question and the relationship which is developing between them and the native peoples of this province.

The Committee urges the Ombudsman to consider whether regional offices should be opened in southern Ontario communities which are relatively "remote" from Toronto. People who live, for example, in the Windsor area can be just as removed from the mainstream of things as someone living in North Bay. Certainly the cost for an investigation of a complaint from someone in Windsor would be quite similar to the cost of investigating a complaint from someone in North Bay. The Committee intends to discuss this matter more fully with the Ombudsman during its next hearings.

(c) Correctional Report

At pages 8 and 9 of his Eighth Report the Ombudsman summarized the final items which were completed during the fiscal period in question and

advised that he is "satisfied with the efforts taken by the Ministry of Correctional Services on these recommendations." The Committee was further advised that the Ombudsman does not intend to prepare and issue a more formal report on the steps taken by the Ministry of Correctional Services to the 105 specific recommendations originally contained in the report released to the Legislature by the Minister of Correctional Services.

This is a departure from the Committee's understanding of how the Ombudsman would "report" on the Correctional Services matter. The Committee is disappointed that, having originally received and monitored the Ombudsman's 105 recommendations, it will not have the benefit of a final precise summary of the disposition of all of the recommendations.

(d) North Pickering

The Committee is pleased to report that Mr. Hoillett has completed and submitted his report to the Ombudsman. The Ombudsman is presently studying that report in order to formulate his plans on how this matter should be resolved.

The Committee urges the Ombudsman, the Minister of Municipal Affairs and Housing and all other parties to the process to work to a resolution of all outstanding matters as quickly as possible. As the Committee stated in its Eighth Report (page 28):

"Those who believe that North Pickering will go away with the passage of time are being unrealistic. The issues that were so prevalent in 1976 respecting the North Pickering Project will return.

Eventually, the Minister of Housing and the Ombudsman will be required to accommodate the substantive provisions of the agreement dated October 1, 1976, regardless of its initial validity in law and regardless of the subsequent actions of the parties thereto.

Evidence that North Pickering will not go away can be found in the recent decision of the Ontario Court of Appeal which confirmed the Ombudsman's jurisdiction to further investigate the claims of the landowners whose cases were referred to the Royal Commission or Inquiry. The Committee is not aware of what the Ombudsman's plans are in respect of these complaints. However, it is now open for the Ombudsman to continue these investigations and to issue a separate report as provided by the Ombudsman Act.

Any further investigation by the Ombudsman will increase the number of reports that may ultimately be tabled in the Legislature and thereby referred to this Committee. The Committee wishes to advise the Legislature that if, as and when all the reports are received, its first order of business will be to inquire why the parties to the October 1, 1976 agreement were unable to resolve all outstanding matters during the 3½ to 4 years that Mr. Hoillett's efforts were underway.

In short, this Committee will be diligent in making a full determination of the actions of the parties to the October 1, 1976 agreement subsequent thereto for the purpose of reporting to the Legislative Assembly of the Province of Ontario, how North Pickering could remain unresolved some five years after the publication of the Ombudsman's initial report."

The Committee intends to regularly and diligently pursue with the Ombudsman and others the progress of his efforts in bringing this matter to an appropriate conclusion.

- (e) Recommendations in Previous Ombudsman Reports in respect of which it is anticipated that some further action will be taken by the Governmental Organization affected

In his Eighth Report the Ombudsman included two charts which summarized the recommendations made under the appropriate categories and the disposition of those recommendations.

The Committee invited responses from all governmental organizations shown on the two charts wherein further responses and/or actions were required. In general these responses were positive and indicated that, for the most part, the governmental organizations in question had or were continuing to comply with the original recommendation made by the Ombudsman and any subsequent recommendation made by this Committee.

The Committee intends, as part of its regular procedures, to review these charts with the Ombudsman and governmental organizations as contained in subsequent reports for the purpose of insuring that total compliance by the governmental organizations is achieved.

In particular the Committee learned that the Ministry of Health has not yet implemented recommendations made by the Ombudsman to the Ministry of Health as reported in his detailed summary No. 40 in his Third Report and as reported by the Committee at pages 32 and 33 of its Fifth Report. In other words the Ministry has failed to implement a recommendation which it accepted over four years ago. The Committee is satisfied that the failure to so implement the recommendation in question is as a result of oversight. However, it is concerned that this matter has been outstanding for so long. ACCORDINGLY THE COMMITTEE RECOMMENDS THAT THE MINISTRY OF HEALTH FORTHWITH IMPLEMENT THE RECOMMENDATIONS AS SET OUT IN THE MINISTRY'S LETTERS TO THE COMMITTEE DATED AUGUST 10TH AND SEPTEMBER 26TH, 1978 (SCHEDULE B.). 2.



- (f) Complaint #45, Fourth Report of the Ombudsman,  
Recommendation #1, Sixth Report of the Select  
Committee Re: Ontario Hospital Appeal Board.

The report of the inquiry of the Ontario Council of Health into the provisions of The Public Hospitals Act, dated November 17, 1980 commissioned by the Minister of Health, was received by the Committee in May of this year. The report identifies certain provisions of The Public Hospitals Act which have the potential of causing or contributing to discrimination or unfairness in the area of the granting of hospital privileges. The report recommends certain amendments to The Public Hospitals Act and its regulations which would minimize the risk of such occurrences.

The report of the Ontario Council of Health has been referred by the Ministry to a Joint Task Force which is reviewing possible amendments to the regulations under The Public Hospitals Act. The Deputy Minister of Health advised the Committee that no decision will be finalized respecting the recommendations of the Ontario Council of Health until the specific recommendations of the Joint Task Force are received. The Committee hopes that the Joint Task Force, in keeping with the spirit of the Ombudsman's recommendation, will invite submissions from the public on the issues raised by the Ontario Council of Health.

In its Eighth Report at page 15, the Committee stated that:

"The Minister of Health is reminded that to the extent that the Council of Health identifies appropriate legislative change and so recommends to the Minister the Committee will view those legislative changes as necessary to fully comply with the recommendations in its Sixth Report."

The Committee intends to pursue the matter of the Ministry's compliance with the recommendation, during its next hearings.

Part V      Recommendations Denied by Governmental Organizations  
as Reported in the Ombudsman's Eighth Report

(a)    Workmen's Compensation Board

Complaint No. 24, Ombudsman's Eighth Report (pages 65-68)

This matter involves a complaint against a decision of the Workmen's Compensation Board dated January 15th, 1979, which confirmed a 10% permanent partial disability award previously granted to the Complainant and which also refused to grant to the Complainant a temporary special supplement on the grounds that in the Board's opinion, the impairment of earning capacity suffered was not significantly greater than was usual for the nature and degree of the injury suffered.

The Complainant was a member of the Royal College of Dental Surgeons of Ontario and practiced dentistry from 1922 until he was required to terminate his practice in 1976 as a result of radio-dermatitis on the dorsal aspect of both hands. This dermatitis apparently developed from the Complainant's use, in his practice, of x-ray equipment without appropriate radiation shielding.

In 1965 the Complainant applied for coverage from the Workmen's Compensation Board, as he was no longer eligible for private insurance plans. The Board accepted his coverage and premiums were paid by the complainant to the Board annually until 1977.

The 10% permanent partial disability award was granted for the radio-dermatitis on an aggravation basis only. The Board apparently found that

the harmful exposure occurred prior to his application for coverage in 1965.

The Complainant has persistently maintained that, but for the dematitis condition, he would not have terminated his practice in 1976 but would have continued working for a further indeterminate period. There appears to be little doubt, however, that he would not now be practicing dentistry.

As a result of the investigation conducted by the Ombudsman's office, the Ombudsman concluded that the 10% permanent partial disability award adequately and fairly represented the residual disability suffered by the Complainant given the timing and circumstances of the injury. However, the Ombudsman concluded, primarily because of the age of the Complainant when he was forced to terminate his practice, that his impairment of earning capacity was significantly greater than is usual for the nature and degree of injury.

The Ombudsman determined, pursuant to Section 22(1)(b) of the Ombudsman Act, that the Appeal Board decision of January 15, 1979 unreasonably denied the Complainant's entitlement to a supplementary award under the provisions of Section 42(5) of the Workmen's Compensation Act (now Section 43(5)). The Ombudsman recommended that the Workmen's Compensation Board vary its decision and award the Complainant a temporary supplement pursuant to that section.

The Board declined to accept the recommendation of the Ombudsman on the grounds that the Complainant could and did not fully comply with the necessary conditions of the section. The Board, however, agreed with the

Ombudsman that the impairment of the earning capacity of the Complainant was in all likelihood greater than usual having regard for the nature and degree of the injury. It further accepted that, as required by the section, the Complainant had demonstrated a willingness to co-operate in a vocational rehabilitation program to place him back into the work force.

However, the Board found that the Complainant could not meet the requirement of the statute that he be available for work "which is available". In other words, notwithstanding the Complainant's readiness and willingness to accept employment, there was none available for him.

The essential difference between the Ombudsman and the Workmen's Compensation Board in this case rests upon the scope of the definition of the phrase, "employment which is available".

The Workmen's Compensation Board interprets the scope of that phrase to include only the field of occupation or employment in which the Complainant has actively sought work and for which he has expressed a desire. The Board views its obligation to be confined to an inquiry as to whether work is available within that sphere of employment. In this case, the Complainant expressed a desire to work in the field of dentistry, which is understandable, and according to the Board, confined his efforts to seek employment to that field.

The Ombudsman disagrees that the Complainant did confine his efforts to the practice of dentistry and relies upon indications in the Workmen's Compensation Board file to the effect that the Complainant might consider



employment opportunities outside the field of dentistry, but would not necessarily accept them. The Ombudsman also does not necessarily agree with the Workmen's Compensation Board's interpretation that the employment availability inquiries be limited to those areas in which the Complainant has confined his efforts.

The Committee is unable to support the recommendation of the Ombudsman. It comes to this conclusion reluctantly and after having considered very carefully the unique circumstances of this case. In the Committee's opinion the Workmen's Compensation Board did fulfill its obligations vis a vis inquiries as to the availability of employment as contained in the section of the Act. In the Committee's opinion it was not unreasonable for the Workmen's Compensation Board to have confined its inquiries and efforts vis a vis employment opportunities within the practice of dentistry and other related fields. The Committee further does not believe that the section of the Act was ever intended to provide temporary supplementary benefits to persons who had passed the usual age of retirement.

(b) Recommendation No. 25, Ombudsman's Eighth Report (pages 68-70)

This case represents a departure by the Ombudsman from his usual practice with "recommendation denied" cases. It involves not one but 135 separate complaints, all of which involve the level and extent of a permanent disability award granted by the Board pursuant to Section 43(1) of the Workmen's Compensation Board Act.

In each case the Workmen's Compensation Board had assessed the nature and extent of permanent disability benefits to the Complainants on the basis of an interpretation of Section 43(1), which has now been supported by two legal opinions obtained from outside the Board (see page 2). The issue raised by each of these complaints is identical to the issue raised by complaint No. 30 in the Ombudsman's Seventh Report as reported in the Committee's Eighth Report (see pages 16 to 20 above). Recommendation 6 of that Report, if adopted by the Legislature, would have required the Workmen's Compensation Board to interpret and apply Section 43(1) of the Workmen's Compensation Act in a manner which would have permitted the payment of benefits which reflect the actual impairments of one's earning capacity rather than tying it to a clinical assessment of the injury suffered.

The Ombudsman, anticipating that the Legislature would support the Committee's sixth recommendation, reviewed each of the 135 complaints and decided that, inasmuch as they all dealt with the identical issue, referred them collectively to the Workmen's Compensation Board. The Ombudsman recommended that the Board reconsider all of the cases and obtain information necessary to assess the workers' impairment of earning capacity, and that the Board alter its practice to take into consideration factors indicative of the actual impairment of earning capacity when assessing a workers' permanent disability award.

Subsequently however, the Legislature refused to adopt the Committee's sixth recommendation, thereby confirming the Workmen's Compensation Board's interpretation of Section 43(1). The Workmen's

Compensation Board has accordingly declined to implement the Ombudsman's recommendation relying as its justification upon the legal opinions obtained and the decision of the Legislature vis a vis the Committee's Eighth Report.

The Committee is unable at this time to make any real determination of any of these cases. These complaints have not been fully investigated and "processed" as the Ombudsman Act requires before an opinion can be formulated and a recommendation made by the Ombudsman pursuant to Section 22 of the Ombudsman Act. As the Committee has stated in earlier reports, it will not support recommendations made by the Ombudsman unless he has complied with the functional requirements of his Act. That was not done in any of these cases.

ACCORDINGLY THE COMMITTEE RECOMMENDS THAT THE OMBUDSMAN, IN EACH OF THE 135 CASES CONTAINED IN DETAILED SUMMARY NO. 25, CONDUCT FURTHER INVESTIGATIONS AS REQUIRED BY THE PROVISIONS OF THE OMBUDSMAN ACT AND THEN FORMULATE SUCH OPINIONS, RECOMMENDATIONS AND REPORTS AS HE CONSIDERS APPROPRIATE IN THE CIRCUMSTANCES. IN EACH OF THESE CASES THE OMBUDSMAN SHALL MAKE A FINDING EITHER IN FAVOUR OF THE COMPLAINANT OR THE WORKMEN'S COMPENSATION BOARD. 3.

The Committee is aware of the heavy burden of case load already imposed upon the Ombudsman's staff and the effect that the addition of these 135 cases will have. ACCORDINGLY, THE COMMITTEE RECOMMENDS THAT THE OMBUDSMAN SUPPLEMENT HIS STAFF AS HE CONSIDERS NECESSARY

AND APPROPRIATE TO HAVE THESE 135 INVESTIGATIONS COMPLETED, REPORTED UPON AND INCLUDED IN A SPECIAL REPORT TO THE LEGISLATURE BEFORE THE END OF JUNE, 1982. 4.

While the Committee, earlier in this report, has indicated that it acknowledges the Legislature's right to reject any recommendation made by it supporting a recommendation of the Ombudsman, it is nevertheless concerned that there remains a very unsatisfactory situation as far as Section 42(1) (now 43(1)) of the Workmen's Compensation Board Act is concerned. It is clear that the section is capable of more than one legal interpretation. The Minister of Labour, the Workmen's Compensation Board and indeed the Legislature, prefer an interpretation which provides that the level of permanent disability award shall be determined solely from the clinical assessment made of the injury in question. The Ombudsman, himself a former Justice of the Supreme Court of Ontario, and this Select Committee have and continue to interpret the section differently as permitting a consideration of all relevant factors in determining the quantum of the permanent disability award.

It is not unusual to have a difference in legal opinions respecting legislation providing for the payment of money benefits to persons in accordance with certain formulae. It is also not unusual to have a difference of legal interpretations of certain statutory provisions which have, for all practical purposes, been applied by the body administering the Act in a manner different from the strict legal interpretation.



In the Committee's Opinion, while the Legislature may have been justified in rejecting the Committee's recommendation on the grounds of the two independent legal opinions obtained by the Board and the Minister of Labour, it has a further duty to assist in the resolution of the consequences of that decision. There is a procedure readily available under the Constitutional Questions Act, R.S.O 1980, Volume 1, Chapter 86, to obtain a final determination of which of the two interpretations is correct. Under that Act,

"The Lieutenant Governor in Council may refer to the Court of Appeal or to a Judge of the Supreme Court for hearing and consideration any matter that he thinks fit, and the Court or Judge shall thereupon hear and consider the matter so referred." (Section 1.)

On such a reference the Court could consider all of the legal opinions expressed to date, the conduct of the Workmen's Compensation Board as it has historically interpreted and implemented the section, and any other circumstances which may be relevant and necessary to interpret the section.

THE COMMITTEE THEREFORE RECOMMENDS THAT THE LIEUTENANT GOVERNOR IN COUNCIL REFER TO A JUDGE OF THE SUPREME COURT OF ONTARIO FOR HEARING AND CONSIDERATION THE INTERPRETATION OF SECTION 42(1) OF THE WORKMEN'S COMPENSATION BOARD ACT (NOW SECTION 43(1)). 5.

The Committee was referred to the provision in the White Paper released by the Ministry of Labour in response to Professor Weiler's report "Reshaping Worker's Compensation for Ontario" that under new Workmen's Compensation Board legislation,

"Those workers who were injured previously but who elect to transfer to the new Act will have their benefits recalculated on the basis of actual wage loss." (emphasis added)

The Committee understands that such legislation will permit the 135 complainants represented by complaint No. 25 to apply to the Workmen's Compensation Board for a recalculation of their benefits more in accordance with the interpretation of Section 43(1) preferred by the Ombudsman and this Committee.

However, the White Paper is apparently silent on the issue of whether the recalculation and entitlement of benefits on the basis of actual wage loss will be retroactive to the date of the commencement of the permanent disability. THE COMMITTEE THEREFORE RECOMMENDS THAT THE MINISTRY OF LABOUR CONSIDER INCLUDING A PROVISION IN THE NEW WORKMEN'S COMPENSATION LEGISLATION TO PROVIDE FOR RETROACTIVE PAYMENT OF BENEFITS TO WORKERS SUCH AS THE 135 REPRESENTED BY THE OMBUDSMAN'S COMPLAINT NO. 25, ON THE BASIS OF ACTUAL WAGE LOSS. 6.

## Part VI

### a) Committee's Term of Reference

In its Fifth Report (1978) the Committee at pages 92-94 stated:

"On June 19, 1978, the Board of Internal Economy agreed that:

"the Chairman of the Ombudsman's Committee be invited to attend meetings of the Board of Internal Economy to observe the preliminary examination by the Board in establishing the Ombudsman's estimates and that these estimates be sent to the House with the recommendation that they be referred to the Ombudsman's Committee for review".

The Committee considered this decision by the Board of Internal Economy and directed the Chairman of the Committee to write to the Speaker accepting the Board's invitation to observe future preliminary examinations by the Board in establishing the Ombudsman's estimates on the condition that the Chairman's observations of the Board's examination of the estimates be made on behalf of the Committee which may be fully discussed with the Committee members during subsequent Committee proceedings.

The Speaker responded to the Chairman's letter confirming that in accepting an invitation by the Board to observe the preliminary examination of the Ombudsman's estimate, the Chairman would be doing so as an observer only, and would be free to discuss his observations with members of the Committee.

The benefit to be derived from the Chairman's attendances at the Board of Internal Economy's meetings will only be realized if the Legislature amends the Committee's Order of Reference providing for it to receive and consider the estimates of the Ombudsman as they become available from the Board of Internal Economy and to report thereon as the Committee considers appropriate to the Legislature. Accordingly, the Committee recommends that its Order of Reference be amended to provide that the Committee receive and consider all estimates and supplementary estimates of the Ombudsman for consideration and reporting thereon to the Legislature with such recommendations as the Committee deems appropriate."

The Committee remains of the opinion that it is best suited and experienced to receive, consider and report upon the Ombudsman's estimates.

IT THEREFORE RECOMMENDS THAT ITS ORDER OF REFERENCE BE AMENDED TO PROVIDE THAT IT RECEIVE AND CONSIDER ALL ESTIMATES AND SUPPLEMENTARY ESTIMATES OF THE OMBUDSMAN AND TO REPORT THEREON TO THE LEGISLATURE WITH WHATEVER RECOMMENDATIONS ARE CONSIDERED APPROPRIATE.<sup>7</sup>.

b) Amendments to the Ombudsman Act

In January, 1981, the Ombudsman provided the Attorney General with a draft bill of amendments to the Ombudsman Act and at the same time submitted a policy submission to the Cabinet in support of the draft bill. The Ombudsman has not yet received any response or comments from the Attorney General or Cabinet respecting the proposed amendments.

The Committee was disappointed to learn that neither the Ombudsman nor the Attorney General wished, at this time, to provide the Committee with a copy of either the bill or policy submission. The Ombudsman did not consider that it was appropriate to provide these matters to the Committee at this time, since it might "prejudice" pending discussions with representatives of the Ministry of the Attorney General.

The Committee fails to understand the reasons given by the Ombudsman. It has been involved with the Ombudsman in discussions respecting amendments to the Act since 1977. It has even recommended amendments to the Act in previous Reports. In any event, it is expected that the Attorney General will in future, table legislation amending the Act. That bill should only



be considered, after second reading, by this Committee. It is the only Committee totally familiar with the Ombudsman's operations and his functions under the present Act. It has already begun a process of discussing legislative amendments with the Ombudsman. It already has the authority to draft Regulations under the Act concerning rules for the guidance of the Ombudsman in the exercise of his functions. THEREFORE THE COMMITTEE RECOMMENDS THAT ANY LEGISLATION TABLED IN THE LEGISLATURE AMENDING OR OTHERWISE DEALING WITH THE OMBUDSMAN ACT BE REFERRED FOR CONSIDERATION, AFTER SECOND READING, TO THE SELECT COMMITTEE ON THE OMBUDSMAN.<sup>8</sup>.



Ministry  
of  
Health

Ontario

- 40 -

SCHEDULE "A"

File No. ....

Date August 17, 1981

Memorandum to

Dr. D.N. Cow, Dr. P.D. Palko, all  
Medical Consultants and the Executive  
Correspondence Unit (E.C.U.)

From

E.J. Murray, M.D., C.C.F.P., Director  
Professional Services Branch  
Re R991 - Directive from the General Manager

Further to the General Manager's directive dated May 21, 1981, regarding claims for procedures unavailable in Ontario (R991), this is to confirm our policy as outlined at that time:

that a subscriber should -

1. be referred by an Ontario physician
2. receive prior approval by OHIP
3. we shall pay the usual and customary fee for that geographical area.

When a claim involving code R991 is refused by OHIP because of the question of medical necessity the subscriber must be notified at the time of refusal of their claim that they may request from the General Manager, in writing, that the claim be referred to the Medical Eligibility Committee. If there is an adverse decision of the Medical Eligibility Committee they will be advised of their right to appeal within 15 days, to the Health Services Appeal Board. Where the claim is paid at a lesser fee than submitted the subscriber must be notified at the time of notification that they may appeal to the Health Services Appeal Board at:

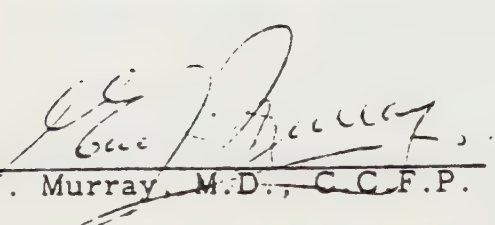
Room SW-1175, Hepburn Block, Queen's Park, Toronto

or, inform the General Manager of their wish to appeal and it shall be forwarded to the Health Services Appeal Board.

The General Manager has given the commitment that all R991 cases will be given broad and flexible interpretation.

Medical Consultants encountering these cases should refer them to Professional Services Branch for adjudication. When adjudicated, the Chief of Medical Adjudication myself and the General Manager review each claim before advising the subscriber of OHIP's decision.

Any question regarding the above can be raised at the next Medical Consultants' meeting.

  
E.J. Murray, M.D., C.C.F.P.

EJM/dis



Ontario

SCHEDULE "B"

Ministry  
of  
Health

Area Planning Co-Ordinators  
15 Overlea Blvd., 6th Floor  
Toronto, Ontario 965-8059

August 10th, 1978

John P. Bell, Esq.,  
Counsel to the Select Committee on  
the Ombudsman,  
Room 110, Main Parliament Building,  
Queen's Park,  
TORONTO, Ontario,  
M7A 1A2.

Dear Mr. Bell:

Further to our recent discussions regarding Complaint #40 of the Third Report of the Ombudsman, the following information is provided for your use:

Recommendation of the Ombudsman:

All applicants should be informed well in advance of the due date for applications, of the criteria upon which the Ministry intends to rely in making the award for a nursing home, including the weight to be attached to each factor.

Minister of Health's Comment:

We have developed a procedure and evaluation criteria for assessing nursing home proposals, and I will see that all applicants are informed well in advance of the due date for applications as well as the criteria and procedures used to assess the applications.

Action Taken:

Since the date of the Minister's letter, there have only been two situations giving rise to a proposal call for additional nursing home beds. The Kent County Proposal call documents are attached as Appendix "A". The Lindsay Proposal Call followed the same procedure.

Recommendation of the Ombudsman:

Every unsuccessful candidate should be provided with written reasons as to why his proposal was rejected, based on these criteria.

Continued:



TO: John P. Bell, Esq.

PAGE: 2

Minister of Health's Comment:

You may be assured that we will provide a written explanation to unsuccessful candidates as to why their proposals were rejected. I am sure you can appreciate that subjective criteria, such as the concern for human needs, originality and creativity and the capacity to relate to the community, might be fairly difficult, and, indeed, at times, perhaps too provocative to communicate objectively. However, I am confident that ways can be found to touch on even these points in a way that will be perceived as being helpful to the applicant.

Action Taken:

Since the date of the Minister's letter, there has only been one proposal in which letters of rejection have gone out, and the procedure outlined in the Minister's comment was not followed.

As you are aware, I have not been the Director of the Inspection Branch since September, 1977, and I cannot at this time, owing to the present Director being on vacation, reconstruct what has occurred to give rise to this situation. However, I will discuss the situation with Mr. C. Brubacher on his return from vacation and be prepared to speak to the issue at the Committee meetings.

Recommendation of the Ombudsman:

The Nursing Homes Act, 1972 be amended in order that provision be made for the successful candidate for the construction of a new home to make application for a conditional licence immediately upon the making of the award to him. The licence should be conditional upon compliance with the terms of the proposal and any subsequent stipulations imposed by the Ministry prior to the granting of an unconditional licence. It, of course, goes without saying that the licence would also be conditional upon the terms of the Act, Regulations and licence being complied with. All those sections of The Nursing Homes Act that presently apply to an applicant for a licence should also be made applicable to an applicant for a conditional licence. It is an anomaly of the present Act that neither the Ministry nor the Director appointed under the Act would, in the case of an applicant for a licence for a new home, be required to put their minds to the items set forth in Sections 4 and 5 in deciding whether a licence should be issued, until after construction was complete.

Minister of Health's Comment:

I agree with your recommendation that the successful applicant have a right to an immediate conditional licence, subject of course to compliance with the terms of the proposal and to those provisions of the legislation which relate generally to licences.



TO: John P. Bell, Esq.

PAGE: 3

Minister of Health's Comment - Continued:

I am prepared to propose a provision to that effect in an amendment to the Act. I should add that my Ministry is reviewing certain other provisions of the Act relating to licensing with a view to possible amendment, and I anticipate that the entire package will go forward at the same time.

Action Taken:

The Ministry is undertaking a substantial review of existing nursing home legislation, and this review is still in its early stages. The Minister's proposition to the Ombudsman will be included in the final version of the review, but is not part of the subject matter being reviewed at the present time.

One additional item discussed at our meeting was the close monitoring of the [REDACTED] to be built in [REDACTED]. The following is an outline of these activities to date:

- Working drawings were approved by the Nursing Home Inspection Service [REDACTED]
- The Fire Marshall's office approved drawings on November 8, 1976, and received additional drawings [REDACTED]
- Construction of the Nursing Home began approximately [REDACTED]
- A Pre-licensing Inspection took place on [REDACTED]

At that time it was determined that too many requirements existed to enable a licence to be issued. [REDACTED], a letter was forwarded to [REDACTED] by registered mail informing him all requirements should be met before a further Pre-licensing inspection took place.

- A second Pre-licensing Inspection took place and it was determined a vast majority of the requirements had been met. A single deficiency pertaining to doors remained, and in the Inspector's opinion this was not a critical issue.
- An application for a Provincial Licence was received and approved as of [REDACTED] licence number [REDACTED].

Continued:


TO: John P. Bell, Esq.

- Final approval for the plans was received from the Ontario Fire Marshall's office on [REDACTED] 1978.
- The Nursing Home was visited by the Co-ordinator, Nutritional Care, Nursing Home Inspection Service, and requirements and recommendations were suggested on [REDACTED]
- A follow-up inspection took place on [REDACTED] and it was reported that all requirements had been met.
- Menus were received by the Inspection Service from the Nursing Home, and these will be reviewed at a dietary workshop in July.

It is anticipated that this Nursing Home will continue under close supervision to ensure the maintenance of adequate operational standards.

I trust the foregoing information meets your needs.

Yours sincerely,



D. W. Corder  
Executive Chairman  
Area Planning Co-Ordinators

DWC:lb

Enclosure

c.c.: I. Freedman, Esq.



Ontario

Ministry  
of  
Health

Area Planning Co-ordinators  
15 Overlea Blvd., 6th Floor  
Toronto, Ontario, M4H 1A9  
Telephone: (416) 965-8059

September 26th, 1978

John P. Bell, Esq.,  
Counsel to the Select Committee on  
the Ombudsman,  
Room 110, Main Parliament Building,  
Queen's Park,  
TORONTO, Ontario,  
M7A 1A2.

**RECEIVED**

SEP 28 1978

SELECT COMMITTEE  
ON THE OMBUDSMAN

Dear Mr. Bell:

Further to my appearance before the Select Committee dealing with the Third Report of the Ombudsman, and as requested, additional information is now provided for your use.

Recommendation of the Ombudsman:

Every unsuccessful candidate should be provided with written reasons as to why his proposal was rejected, based on these criteria.

Minister of Health's Comment:

You may be assured that we will provide a written explanation to unsuccessful candidates as to why their proposals were rejected. I am sure you can appreciate that subjective criteria, such as the concern for human needs, originality and creativity and the capacity to relate to the community, might be fairly difficult, and, indeed, at times, perhaps too provocative to communicate objectively. However, I am confident that ways can be found to touch on even these points in a way that will be perceived as being helpful to the applicant.

Action Taken:

Since the date of the Minister's letter, there has only been one proposal in which letters of rejection have gone out, and the procedure outlined in the Minister's comment was not followed. This situation arose due to the newly appointed Director of the Inspection Branch being unfamiliar with the Minister of Health's correspondence with the Ombudsman.

This situation has been discussed with the Director involved, and please be assured that this issue will be addressed in any future awards of new nursing home beds.

TO: John P. Bell, Esq.

PAGE: 2

In addition, this letter will confirm my agreement, on behalf of the Ministry of Health, to share with your Committee a copy of the final document arising out of this Ministry's substantial review of existing nursing home legislation.

Yours sincerely,



D. W. Corder  
Executive Chairman  
Area Planning Co-ordinators

DWC:1b

c.c.: The Honourable D.R. Timbrell  
A. Maloney, Q.C.  
Mr. W.A. Backley  
Dr. B. Suttie  
Mr. I. Freedman  
Mr. C.L. Brubacher



SCHEDULE "C"

SUMMARY OF RECOMMENDATIONS  
CONTAINED IN REPORT

1. Therefore, THE COMMITTEE RECOMMENDS THAT ALL DECISIONS MADE BY OHIP IN RESPECT OF ANY CLAIM MADE FOR BENEFITS PURSUANT TO CODE R990 (NOW R991) BE SUBJECT TO THE APPEAL PROCEDURES SET OUT IN THE GENERAL MANAGER'S DIRECTIVE DATED MAY 21ST, 1981 AND THE MEMORANDUM OF THE DIRECTOR OF THE PROFESSIONAL SERVICES BRANCH DATED AUGUST 17, 1981 (SCHEDULE A).<sub>1.</sub> (Page 14)

2. ACCORDINGLY THE COMMITTEE RECOMMENDS THAT THE MINISTRY OF HEALTH FORTHWITH IMPLEMENT THE RECOMMENDATIONS AS SET OUT IN THE MINISTRY'S LETTERS TO THE COMMITTEE DATED AUGUST 10TH AND SEPTEMBER 26TH, 1978 (SCHEDULE B.).<sub>2.</sub> (Page 26)

3. ACCORDINGLY THE COMMITTEE RECOMMENDS THAT THE OMBUDSMAN, IN EACH OF THE 135 CASES CONTAINED IN DETAILED SUMMARY NO. 25, CONDUCT FURTHER INVESTIGATIONS AS REQUIRED BY THE PROVISIONS OF THE OMBUDSMAN ACT AND THEN FORMULATE SUCH OPINIONS, RECOMMENDATIONS AND REPORTS AS HE CONSIDERS APPROPRIATE IN THE CIRCUMSTANCES. IN EACH OF THESE CASES THE OMBUDSMAN SHALL MAKE A FINDING EITHER IN FAVOUR OF THE COMPLAINANT OR THE WORKMEN'S COMPENSATION BOARD.<sub>3.</sub> (Page 33)

4. ACCORDINGLY THE COMMITTEE RECOMMENDS THAT THE OMBUDSMAN SUPPLEMENT HIS STAFF AS HE CONSIDERS NECESSARY AND APPROPRIATE TO HAVE THESE 135 INVESTIGATIONS COMPLETED, REPORTED

UPON AND INCLUDED IN A SPECIAL REPORT TO THE LEGISLATURE BEFORE THE END OF JUNE, 1982. <sup>4.</sup> (Page 33/34)

5. THE COMMITTEE THEREFORE RECOMMENDS THAT THE LIEUTENANT GOVERNOR IN COUNCIL REFER TO A JUDGE OF THE SUPREME COURT OF ONTARIO FOR HEARING AND CONSIDERATION THE INTERPRETATION OF SECTION 42(1) OF THE WORKMEN'S COMPENSATION BOARD ACT (NOW SECTION 43(1)). <sup>5.</sup> (Page 35)

6. THE COMMITTEE THEREFORE RECOMMENDS THAT THE MINISTRY OF LABOUR CONSIDER INCLUDING A PROVISION IN THE NEW WORKMEN'S COMPENSATION LEGISLATION TO PROVIDE FOR RETROACTIVE PAYMENT OF BENEFITS TO WORKERS SUCH AS THE 135 REPRESENTED BY THE OMBUDSMAN'S COMPLAINT NO. 25, ON THE BASIS OF ACTUAL WAGE LOSS. <sup>6.</sup> (Page 36)

7. IT THEREFORE RECOMMENDS THAT ITS ORDER OF REFERENCE BE AMENDED TO PROVIDE THAT IT RECEIVE AND CONSIDER ALL ESTIMATES AND SUPPLEMENTARY ESTIMATES OF THE OMBUDSMAN AND TO REPORT THEREON TO THE LEGISLATURE WITH WHATEVER RECOMMENDATIONS ARE CONSIDERED APPROPRIATE. <sup>7.</sup> (Page 38)

8. THEREFORE THE COMMITTEE RECOMMENDS THAT ANY LEGISLATION TABLED IN THE LEGISLATURE AMENDING OR OTHERWISE DEALING WITH THE OMBUDSMAN ACT BE REFERRED FOR CONSIDERATION, AFTER SECOND READING, TO THE SELECT COMMITTEE ON THE OMBUDSMAN. <sup>8.</sup> (Page 39)











FEB 10 1993





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